

*PARLIAMENTARY DIVORCE.*

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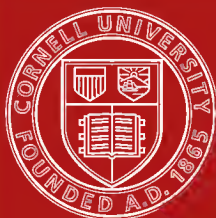
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The practice of the Parliament of Canada



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THE PRACTICE  
OF  
The Parliament of Canada  
UPON  
BILLS OF DIVORCE  
INCLUDING AN HISTORICAL SKETCH OF  
PARLIAMENTARY DIVORCE

AND  
Summaries of all the Bills of Divorce presented  
to Parliament from 1867 to 1888,

ALSO  
*NOTES ON THE PROVINCIAL DIVORCE COURTS, &c.*

BY  
JOHN ALEXANDER GEMMILL,  
OF OSGOODE HALL, BARRISTER-AT-LAW.

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Entered according to Act of the Parliament of Canada, in the year one thousand eight hundred and eighty-nine, by JOHN ALEXANDER GEMMILL, at the Department of Agriculture.

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THIS WORK  
*IS RESPECTFULLY DEDICATED*  
TO  
THE MEMBERS OF  
THE SENATE AND HOUSE OF COMMONS  
OF CANADA

*IN THE HOPE THAT IT MAY AID IN THE ADMINISTRATION OF LEGISLATIVE  
DIVORCE ON PRINCIPLES CONSISTENT WITH THE DIGNITY  
OF PARLIAMENT AND ITS HIGH POSITION AS THE  
CUSTODIAN OF THE MORALS AND WELL-  
BEING OF THE COMMUNITY*

BY THEIR  
OBEDIENT HUMBLE SERVANT,  
THE AUTHOR.



## PREFACE.

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IN the following pages an attempt has been made to indicate, as nearly as circumstances will permit, the principles and practice of Parliament in dealing with Bills of Divorce.

The difficulties naturally attending an undertaking of this kind will be appreciated, when it is remembered that no specific grounds of relief have been fixed by Statutory or Judicial authority in Canada, and that the principles—as they are understood to be—can be ascertained only by a careful study of such cases as have already been determined by Parliament. The literature on Legislative Divorce is rare both in England and the United States, and in Canada no work on the subject has ever been published. The author has consequently had to travel an untrodden road and been obliged to expend much time and labour in collecting materials, as well as in consulting original matter, not published. The materials referred to were frequently found in a crude and fragmentary condition, and in many instances, cases apparently parallel, presented bewildering inconsistencies.

When the mass collected was digested and arranged, the extent of the subject for treatment was one of serious consideration—regard being had on the one hand to avoid a bulky and expensive volume—on the other, to set down all that was essential in a work designed as a Manual of Practice.

The author has gladly availed himself of the light thrown by recent debates on Legislative Divorce, and has

given the substance of the whole debate in the important Tudor-Hart case, in which important principles were examined and pronounced upon.

The paramount power of the Parliament of Canada to deal with divorce and all its incidents, irrespective of 'the precedents or practice of other tribunals, has been kept fully in view and the best known authorities have been cited in its support.

It must be admitted that there exists no subject—legislative or legal—more important in any point of view to the great interests of society, and to the personal happiness of its members, than the subject treated of. The author has therefore seen fit to devote a considerable amount of space to the discussion of two social questions, more likely than any other to affect Canadians, namely, the equal right of the wife to a divorce for the simple adultery of the husband, as exemplified in the Tudor-Hart case, and the effect of American divorce decrees on marriages of Canadians, as will be seen on reference to the Ash case. Happily for the interests of society Parliament has recently pronounced in favor of the former, and as to the latter—it has emphatically declared that the American divorce is of no validity when the parties, being Canadians, reside temporarily in the United States merely for the purpose of legal qualification for divorce.

An exhaustive examination and discussion of the various views and theories touching divorce was not possible or contemplated in a work of this kind but some incidental reference, it will be found, has been made to them.

For the first time the facts relating to the Provincial Divorce Courts and the powers incident to Marriage exercised by Courts of Law in the other Provinces of the Dominion, have been grouped together and discussed. The Statis-

tics on Divorce in Canada and in other countries as given in the Appendix and Addendum will be found of interest in connection with this chapter.

It was only during last session that procedure was systematized and reduced to something like precision. In treating of these new rules of Procedure the author's experience as Parliamentary Counsel and Solicitor disclosed to him many points not familiar to the general practitioner.—These he has not failed to deal with as fully as possible.

Some thirty-six applications for divorce bills have been presented to Parliament since the Confederation of the Provinces, and for the first time, these have been summarized so as to bring out the salient features in each, after the manner of the Leading Cases of Parliamentary Divorce in *Macqueen's Practice of the House of Lords, 1842*.

A brief extract from the work of a learned writer on the duty of Church and State in relation to Marriage and Divorce is deemed of sufficient interest to be included in the Appendix.

The advantage to a fact-finding body like Parliament having at hand a few useful hints as aids in examining witnesses, determining the value of evidence and in drawing conclusions from given facts, has induced the author to conclude the Appendix with some extracts from a valuable work—"Ram On Facts."

In the opinion of many, Rule D, which requires publication of a Notice of Application for a period of six months, is a needless expense, and might well be shortened or abolished altogether. The object of the Rule is doubtless to afford the parties time for reconciliation, but the circumstances on which an application for a divorce ~~are~~ <sup>are</sup> founded, are such in Canada, that if the petitioner be a refined and virtuous person, it would be unreasonable to

expect reconciliation with an unfaithful spouse. In the course of his professional practice, the writer has not known of any case being discontinued owing to a reconciliation of the parties, but he has found that the advertizing of the Notice of Application has had the effect of causing inquiries to be made in cases which might otherwise have been allowed to slumber. The publication in local newspapers for such a long period of the causes of a proposed divorce must also have a demoralizing influence on the young people into whose hands the newspapers may fall. Looked at therefore, from any point of view, little can be said in favour of the Rule.

The present cumbersome mode of providing for the attendance of witnesses might be considerably simplified by an order that the summons for witnesses be issued in blank, signed by the Speaker of the Senate, as in the analagous case of summons issuing from the High Court of Justice.

It has frequently occurred to the writer that the value of a Report of the Evidence made to the Senate by the Select Committee on Divorce, might be materially increased, if the print of the evidence contained a note of any legal authorities cited by Counsel in support of either side of a case. In this form, the citations would be at once accessible to members of both Houses, desirous of ascertaining for themselves any law applicable to the particular case. This recommendation is not without precedent, as something of the kind appears in the printed copy of the evidence in the Westropp case, before the House of Lords in 1886.

The preparation of this work has cost more labour than its size would indicate—and if those who have occasion to refer to it receive even a small degree of the information the author has acquired in preparing it, the time and attention given, will, he ventures to think, be well bestowed.

The author cannot properly close these remarks without expressing his deep sense of obligation to the Hon. James R. Gowan, LL.D., who kindly perused the proof sheets during the progress of the work through the press, and aided him with many valuable suggestions. Those who are aware of the Hon. Senator's earnest and successful endeavours in the Session of 1888—backed by all the knowledge acquired by him during his forty years' judicial experience—to place the practice of Parliamentary Divorce on a more certain and satisfactory footing than it had hitherto been, will well understand the writer's advantage in having the benefit of his mature judgment and advice.

The author also returns his sincere thanks to J. G. Bourinot, LL.D., Clerk of the House of Commons ; Hon. J. A. Boyd, Chancellor of Ontario ; Hon. Mr. Justice Burbridge, Ottawa ; Hon. Mr. Justice Bain, of Winnipeg ; Hon. W. McDougall, C. B., Q. C. ; Mr. J. S. Hall, Q. C., M.P.P. and others for aid they have given him.

J. A. G.

14 VITTORIA STREET,  
OTTAWA, 29th January, 1889.





## PREFATORY NOTE,

By J. G. BOURINOT, LL.D., Clerk of the House of Commons, Canada.

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HAVING had an opportunity of studying the advance sheets of this Treatise on *Parliamentary Divorce in Canada*, I have much pleasure in bearing testimony to the value it will prove to all students and others interested in so important a question. The logical arrangement of the whole subject, and the legal acumen displayed in collating the authorities and laying down the principles set forth in Parliament and Courts of Law, render the volume one of decided importance. When, some years ago, the present writer had occasion to study the question in preparing his large work on Parliamentary Procedure, his difficulties were greatly increased by the fact that there were no text books in this country on the subject of divorce, and he was therefore obliged to depend for his material chiefly on the Journals and imperfectly reported debates of the Upper House of the old Legislature of Canada and of the Senate. This material was very unsatisfactory at times, in the absence of any authoritative exposition of the principles on which Parliament generally acted.

Canada has now been given in express terms by the British North America Act of 1867, complete and exclusive jurisdiction over the subjects of Marriage and Divorce in Canada. The history of the question in itself shows the large measure of legislative authority now granted to this dependency of England. The Governor General's instructions previous to 1878, directed him positively not to assent in Her Majesty's name to "any bill for the divorce of persons joined together in holy matrimony." In accordance with these instructions between 1867 and 1878

inclusive, eleven divorce bills were reserved, though they were afterwards sanctioned by the Queen in Council. These instructions were originally framed for provinces possessing powers and privileges inferior to those granted to Canada by the Constitutional Act of 1867. These instructions, as well as the Commissions of the Governors General were accordingly changed in 1878 in conformity with suggestions made by Mr. Blake, while Minister of Justice, in valuable State papers relating to our Constitutional privileges. The reserved power of disallowance which her Majesty in council possesses under the law is now considered quite sufficient for all possible emergencies. Consequently, all divorce bills are assented to, with other bills at the close of a session of Parliament, and become law in due form—the power of disallowance not being exercised in cases where the Parliament of Canada has full jurisdiction. The clause in the former Royal instructions, requiring that certain classes of bills should be reserved for Her Majesty's approval, was omitted—as stated by the Secretary of State for the Colonies at the time of the change—“because Her Majesty's Government thought it inadvisable that the instructions should contain anything which could be interpreted as limiting or defining the legislative powers conferred in 1867 on the Dominion Parliament.”

If there is one matter more than another which will attract the attention of the student of Mr. Gemmill's excellent Treatise, it is the fact that the Parliament of Canada appears fully aware of the great responsibility which is imposed upon it, as the only body which can confer divorce in those parts of the Dominion which do not contain courts for the trial of such cases. It has been urged frequently that the time has come for removing the trial of these cases from the legislative tribunal and giving it to the courts of law as in the Maritime Provinces of Canada. Perhaps there may have been some

reason found for the argument in the relatively loose procedure which existed in the Senate previous to 1888; but it can now be urged that the improvements which have taken place in that procedure—so clearly outlined by the author of this Treatise—under the energetic and learned supervision of Senator Gowan, in a great measure removed the objections that have been advanced against continuing so important a subject under the jurisdiction of Parliament. Indeed the facts adduced by Mr. Gemmill go to build up a strong argument in favor of the present system. It is interesting to note—as he shews on page 256—that Parliament has granted only twenty-six divorces since 1867, while the courts of Nova Scotia and New Brunswick alone during the same period have granted no less than ninety two altogether—statistics which go to prove that the establishment of courts for this purpose increases the facilities for obtaining divorce.

It has also been very emphatically shewn by Senator Gowan in the course of the debates on the new Rules of Procedure that the fact that each State of the American Federation has sole jurisdiction over the subject, and has given the courts full power to grant divorces, has tended to the loosening of the marriage tie, and has been most injurious in that way to morals and the sanctity of home life, on which depends so much of the happiness of peoples.

In reading the debates on the famous Ash case—to which much prominence is properly given in this Treatise—one is struck not merely by the learning and acumen displayed by the leading speakers on this question, but also by the great wisdom of the principles laid down by Hon. Mr. Abbott, Hon. Mr. Gowan, and Hon. Mr. Scott, that it is the bounden duty of Parliament to keep well within itself the power of dissolving the marriage tie, and not to bind

itself in any degree to recognize divorces granted in a foreign country. As Mr. Abbott observed with obvious truth, the Senate in such cases acts not only in a *quasi*-judicial, but also in a legislative capacity. It is to be hoped that Parliament will continue to adhere to the important principle laid down in that case, and not give any consideration or recognition to any judgment of foreign tribunals in matters which are placed by our fundamental law within its own exclusive jurisdiction.

JNO. GEO. BOURINOT.

HOUSE OF COMMONS,  
19th January, 1889.

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## ADDENDUM.

Through the courtesy of CARROLL D. WRIGHT, Esquire, *Commissioner of Labour, Washington, D.C.*, the author has been enabled to extract the Divorce Statistics of the United States for the period between 1867 and 1886 from that gentleman's "*Special Report on the Statistics of Marriage and Divorce, made to the United States Congress, February 1889.*"

Read with what is said on page 256 *et seq.* of this work, the following Table will prove interesting :

COMPARATIVE TABLE SHEWING NUMBER OF DIVORCES GRANTED IN CANADA AND THE UNITED STATES OF AMERICA, FROM 1867 TO 1886, BOTH YEARS INCLUSIVE :

	No. of Divorces Granted in Canada.	No. of Divorces Granted in the U. S.		No. of Divorces Granted in Canada.	No. of Divorces Granted in the U. S.
1867....	none	9,926	Brought forward	40	137,703
1868....	4	10,154	1878....	8	16,089
1869....	4	10,931	1879....	4	17,086
1870....	3	10,962	1880....	5	19,666
1871....	4	11,591	1881....	7	20,762
1872....	4	12,387	1882....	6	22,111
1873....	4	13,158	1883....	13	23,199
1874....	none	13,986	1884....	10	22,989
1875....	5	14,219	1885....	12	23,473
1876....	3	14,811	1886....	11	25,535
1877....	9	15,678			
Carried for- ward.....	40	137,703	Total....	116	328,613

The ratio of divorce to population in Canada, on the basis of the census of 1881, for the above period, is 1 to 37,283 persons ; while in the United States, on the basis of the census of 1880, for the same period, the ratio is 1 to 150 persons.

## CORRIGENDA.

Page 12, foot note (p), read "base and" for "based an"

" 48, 16th line, read "of" for "or"

" 57, 13th line, read Hallam the historian does not favour "our modern *privilegia*, our Acts of Parliament to break the bond, &c., for "Hallam the historian does not favour our modern *privilegium*, our Acts of Parliament, etc."

" 105, 21st line, read "common parlance" for common practice."

# THE PRACTICE

—OF—

## PARLIAMENTARY DIVORCE IN CANADA.

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### CHAPTER I.

#### THE ORIGIN AND HISTORY OF DIVORCE IN ENGLAND.

SOME account of the Law of Divorce as it existed in England prior to 1858 seems a fitting introduction to the subject the writer proposes to treat of—Parliamentary or Legislative Divorce in Canada. The first report of the Commissioners appointed by the Queen in 1850 to inquire into the mode of obtaining divorces *à vinculo matrimonii* in England, furnishes an admirable compendium and the writer has availed himself of the learned labors of the Commissioners, giving the substance of their report, and where it seemed necessary, in the language used.

The Report was presented to both Houses of Parliament by command of Her Majesty in 1853 (*a*). It bears the signatures of Lord Campbell, Sir Stephen Lushington, Lord Beaumont, Spencer H. Walpole, Sir William Page Wood and Edward Pleydell Bouverie. The seventh Commissioner, Lord Redesdale, dissented from the recommendation of the rest in regard of divorce *à vinculo* and annexed to the Report a statement of his reasons for considering marriage indissoluble.

**Nature of Divorce in England.**—Divorces in England were until 1858 of two kinds,—the one partial and the other total (*b*). Partial Divorces were called Divorces *à mensâ et thoro*, because they

(*a*) 64 Lords' Journals, (1852-3),  
p. 59.

(*b*) Bl. Com. Vol. I. p. 440;  
Co. Litt. 235; 3 Inst. 89.

separated the married parties from each other's society, without dissolving the marriage union. Total Divorces were called *à vinculo matrimonii*, because they dissolved that union altogether, either on the ground of some antecedent incapacity which rendered the *contract* void from the beginning, or on the ground of some supervenient cause, which, having arisen subsequently to the marriage, justified the parties in desiring to put an end to it.

Divorces *à mensâ et thoro* were little more in the eye of the law than simple separations; they only lasted until the parties thought fit to be reconciled; and they were granted at the suit of the husband or wife, when the gross misconduct of either of them, such as cruelty, adultery, or the like, rendered it impracticable for them to live together.

The Common Law of England, which followed in this case the Canon Law of the Church, "deemed so highly, and with such mysterious reverence, of the nuptial tie," that the causes of divorce were purposely limited to a few extreme and specific provocations; and the best preservation of that union, so long as it could be secured, was so manifestly essential to the best interests of society, that before it could be dissolved it had to be clearly established by the strictest proof that the offence had been committed, that there was no contrivance by which the parties were endeavouring to escape from their solemn obligations to themselves and their children; that they could not discharge their mutual duties by continuing any longer to cohabit with each other, and that the party complaining was free from guilt. Hence arose certain well-known rules, which the Ecclesiastical Courts invariably acted upon; as first, that divorce would only be granted for the extreme provocations adverted to above; secondly, that the law would not suffer it to be obtained on the sole confession, of the parties themselves; and thirdly that it would be refused even although an offence had been committed which would otherwise justify it, if collusion, connivance, condonation, or recrimination could be pleaded and proved.

**Divorce à Mensâ et thoro.**—Since the effect of a divorce *à mensâ et thoro* was not to dissolve the marriage bond, but simply to authorize under certain circumstances the separation of the parties, their legal rights remained in most respects what

they were before ; though their moral obligations toward themselves and their children were materially altered by the impossibility of discharging them any longer together. For which reason a divorce of this kind would neither bar the wife of her dower, nor deprive the husband of his marital rights in respect of her property. Nor would it enable either of the parties to marry again ; nor would it exempt them from the censure of the Ecclesiastical Court for living incontinently. Nor would it bastardise the subsequent born issue ; but during the separation the Court would decree a competent allowance to the wife for her maintenance under the name of alimony. This allowance depended on the innocence or delinquency of the parties, and was measured by the means and circumstances of the husband.

**Divorce à Vinculo.**—Total divorces, or divorces *à vinculo matrimonii* were those which *annulled* or those which rescinded the marriage contract ; the former being grounded on some antecedent incapacity which rendered it in reality void from the beginning : the latter being granted in consequence of some supervenient cause, which, having arisen subsequently to the marriage, justified the parties in desiring to put an end to it.

With regard to the former, the causes for which a marriage might be annulled were much more extensive before the Reformation than they were after. Before the Reformation marriages were liable to be set aside upon proof of precontract with some other person, or because the connexion was within the degrees of consanguinity or affinity prohibited by the Canon Law, which was far more restrictive than the law of God. After the Reformation these rules were altered on account of the inconveniences which resulted from them ; for to use the language of an old Statute ( 32 Hen. 8, C. 38,) “ Marriages were brought into such uncertainty thereby that none could be surely knit and bounden, but it should be in either of the parties’ power and arbiter, casting away the fear of God by means and compasses to prove a precontract, a kindred and alliance, or a carnal knowledge to defeat the same.” Accordingly that Statute declared all marriages to be good and indissoluble, notwithstanding a precontract ; and the forbidden degrees were limited to those which the law of God defines. The only grounds therefore after the passing of that

Statute, for nullifying and absolving the marriage contract by reason of some antecedent incapacity, were relationship within the forbidden degrees, a previous marriage, corporal imbecility or mental incompetency.

In cases of this description the Ecclesiastical Courts did not exercise, nor did they possess, a rescinding power. They had no authority to dissolve a marriage good in itself, whatever might be the delinquency of the parties. And the sentences pronounced were improperly termed sentences of divorce *à vinculo matrimonii*, for in the cases to which alone such sentences were applicable, there was in fact, in the eye of the law, no legal *vinculum* or binding tie of any kind.

### **Marriage Indissoluble—Interference of Parliament.**

—With regard to divorces which rescinded the marriage contract, it is to be observed that, strictly speaking, they were unknown in England. By the law of England that contract was indissoluble, and when once it had been constituted in a legal manner, there were no means of putting an end to it in any of the courts. Nevertheless, the actual dissolution of such a contract, when adultery had been committed, was so consonant to reason and religion, that where the general law failed to give a remedy, Parliament stepped in to provide one specially, by passing a particular law in favor of those who could make out a case which would warrant its interference. The origin of these *privilegia* is important and instructive.

### **Marriage a Sacrament—View of the Reformers.—**

In Roman Catholic times, marriage was regarded as a sacrament by the Canon Law ; and being a sacrament it was deemed indissoluble. But when the Reformation came the courts denounced, amongst other opinions of the Romish Church, the doctrine of a sacrament in marriage, “Retaining the idea of its being of Divine institution in its general origin,” but considering it in the light of a civil contract which for its full completion had always required, in England at least, some religious solemnity. The character of marriage was thus materially altered ; for since it was no longer to be deemed a sacrament, there was nothing, on that account, to render it indissoluble ; and as the Reformers were about to revise the whole body of the Canon Law, which



had become unsuitable to a Protestant country, they did not omit the matrimonial code. With this view various Acts (c) were passed, providing that the Crown should have full power to nominate Commissioners to order and compile such laws Ecclesiastical as should be thought convenient. "A work was accordingly composed for this purpose by Cranmer, and translated into Latin with a happy imitation of the clear method and legal brevity of the Roman jurists, by Sir John Cheke and Dr. Hadden, two of the restorers of classical literature in England" (d). This work, having never received the Royal confirmation, did not become law, but it is of great authority. It has been published under the title of "Reformatio Legum Ecclesiasticarum," and the articles on the subject of marriage and divorce are peculiarly interesting, as containing, in a short compass, the opinions of the first Reformers in matters which affect the civil rights of all men, as well as the highest of all the moral interests of society.

**Case of Marquis of Northampton.**—It is supposed that the regulations contained in this code on the subject of divorce were occasioned by the case of Parr, Marquis of Northampton, who had divorced his wife, Ann Boucher, for adultery, in the Ecclesiastical Court. For, according to the custom which then prevailed, it is probable that divorces had no certain and immediate effect beyond that of a legal separation from bed and board. A Commission, however, was appointed to enquire whether by a divorce on this ground, that is to say, on the ground of adultery, he was not so divorced from Lady Ann, that no divine law prohibited his marriage. The Marquis was too impatient to wait for the issue of the Commissioners' researches, and in the interim he married again, Elizabeth Brooke, daughter of Lord Cobham. Two years afterwards, the Commission made answer to the queries put to them, "the band of wed-lock being broken by the mere fact of infidelity, the second marriage was lawful." After that, the Parliament of 1551 confirmed this answer by declaring that the marriage of Northampton and Elizabeth Brooke was "lawful, as by the law of God indeed it was, any decretal, Canon ecclesiastical, law or usage to the contrary,

(c) 25. Hen. VIII. c. 19, s. 2 ; 27. Hen. VIII. c. 15 ; 35. Hen. VIII. c. 16 ; 3 and 4 Ed. VI. c. 11. (d) Mackintosh's History of England, Vol. II., p. 275.

notwithstanding." But since this statute was repealed by a law passed in the following reign, "nothing is left of these proceedings except the advised and lasting belief of Cranmer, and his associates in Reformation that a more extensive liberty of divorce ought to be allowed" (e).

Apparently, in fact it was allowed for more than half a century. From the year 1550 until the year 1602, marriage was not held by the Church, and therefore was not held by the Law, to be indissoluble. Parr's case is one proof of this ; and another and a still stronger one is the language used by the Ecclesiastical authorities of 1597. For by the 105th Canon a discrimination is made between the process of dissolving and the process of annulling matrimony, remedies then existing, or supposed to exist in the Spiritual Courts. The Canon is in these words :—"Forasmuch as matrimonial causes have been always reputed among the weightiest, and therefore require the greatest caution when they come to be handled and debated in judgment, especially in cases wherein matrimony is required to be *dissolved or annulled* ; we strictly charge and enjoin that in all proceedings in divorce and nullities of marriage, good circumspection and advice be used, and that the truth may as far as possible be sifted out by the depositions of witnesses and other lawful proof, and that credit be not given to the sole confessions of the parties themselves, howsoever taken upon oath, either within or without the Court."

The Church, however, was still anxious to discourage as much as possible a second marriage after divorce ; and accordingly it requires by the 109th Canon that "In all sentences pronounced only for divorce and separation *à mensâ et thoro*, there shall be caution and a restraint inserted in the said sentence that the parties so separated shall live chastely, and neither shall they, during each other's life, contract matrimony with other person. And for the better observance of this last clause the said sentence of divorce shall not be pronounced until the party or parties requiring the same shall have given good and sufficient caution and security unto the Court that they will not any way break or transgress the said restraint or prohibition."

(e) Macqueen's Practice of House of Lords, p. 468 and p. 792.

The very fact of enjoining a prohibitory bond implies that the marriage which the bond was intended to prevent would have been valid (*f*).

**Foljambe's Case, 1601.**—While the Church of England disclaimed, as a body, the doctrine of indissolubility, it is probable that many members of it adhered to the old opinion: for when the case of Foljambe (who, after a divorce, had married a second time, living his first wife), was brought before the Court of Star Chamber, it was there held that the second marriage was void "because" according to the Report of Moore (*g*) "the first divorce was but *à mensâ et thoro*, and not *à vinculo matrimonii*"; and the then Archbishop of Canterbury, said that he had called to him at Lambeth the most wise divines and civilians, who all agreed in this." Now this determination was inconsistent with the opinions of the Reformed divines in the "Reformatio Legum," it clashes with the case of the Marquis of Northampton, and it cannot be reconciled with the Ecclesiastical Constitutions of 1597; and it was also opposed to the practice of the laity for at least half a century. Accordingly Mr. Serjeant Salkeld (*h*) lays it down that "divorce for adultery was anciently *à vinculo matrimonii*"; and therefore, in the beginning of the reign of Queen Elizabeth, the opinion of the Church of England was, that after a divorce for adultery the parties might marry again. But in Foljambe's case he adds, 44 Elizabeth, in the Star Chamber, that opinion was changed. And Archbishop Bancroft upon the advice of divines, held that adultery was only a cause of divorce *à mensâ et thoro*."

**Indissolubility of Marriage re-established.**—The doctrine of indissolubility was thus not only re-established, but it operated in England with a rigour unknown in Roman Catholic times; the various fictions and devices in the shape of canonical degrees and alleged precontracts, which then afforded so many loopholes of escape from its severity, having been each and all put an end to at the Reformation.

It may be reasonably doubted whether the decision in Fol-

(*f*) See Bishop Cozen's argument in the Duke of Norfolk's case A.D. 1700, Macqueen's House of Lords Practice, p. 554.

(*g*) Moore, 683.

(*h*) 3 Salk. 138.

jambe's case was assented to by the Church of England, as a body, for the Chamber of Convocation in the succeeding year re-enacted, word for word, the Ecclesiastical Constitutions of 1597; these, as subsequently confirmed by James I., became a substantive part of the Ecclesiastical Law of England, being in fact the well-known Canons of 1603, which have never been repealed or disturbed. In the year 1604, the Statute of Bigamy (1 Jac. I., c. 11) was passed by the Legislature, making that offence felony; but containing an express proviso that the Act should "Not extend to any person divorced by sentence of the Ecclesiastical Court." Now, it can hardly be supposed that the Legislature intended to declare in one and the same breath that bigamy was felony, and yet that a second marriage after divorce, living the first wife, was not to be considered in that light, unless it conceived that the sentence passed in the Ecclesiastical Court had worked a dissolution of the marriage contract.

How far the conduct of the laity may have been affected by these proceedings, it is difficult to conjecture. What was the practical rule respecting second marriages in the reign of James I., or in that of his son, or during the time of the Commonwealth, we are but little informed. Mr. Spence has conjectured that, in early times, the Court of Chancery, under its clerical chancellors, exercised jurisdiction to decree a divorce *à vinculo matrimonii* (i). The authorities for this are far too loose to allow us to draw any accurate conclusion from them, save that they show that parties divorced *à mensâ et thoro* were endeavoring to find some competent tribunal which would set them free from the marriage bond, and enable them to contract a second marriage. Such a tribunal was certainly not found until application was made to Parliament. One of the chief grounds for the application was to prevent the fathering of illegitimate children on the unhappy husband whose bed had been violated. Accordingly, in Mr. Lukenor's case, an Act was obtained to bastardise the issue born while his wife, against whom a sentence of divorce had been obtained, continued to live in open adultery; but it did not dissolve the marriage bond, or allow the innocent party to marry

(i) Spence, *Equitable Jurisdiction of the Court of Chancery*, Vol. I., p. 702.

again (*k*). The first case which answered the double purpose of bastardising the issue and enabling parties to marry again is that of Lord Roos, in the reign of Charles II. The facts were shortly these: In the year 1666, an act was passed bastardising the children of Lady Ann Roos, by reason of her adultery, and thereupon her husband, Lord Roos, following up this proceeding by obtaining from the Spiritual Court a sentence of divorce *à mensâ et thoro*. But these proceedings were incomplete for his purpose: and since "There was no probable expectation of posterity to support the family in the male line, but by the said John Manners, Lord Roos," a bill was brought in entitled "An Act for Lord Roos to marry again," and it enabled him to do so and gave to the children born in such wed-lock the character of legitimacy, and the capacity of inheriting (*l*).

The case is interesting and important, as constituting a distinct Parliamentary negation of the doctrine of indissolubility, so early as the reign of Charles II. The difference between the case of Lord Roos and the case of the Marquis of Northampton seems to have been this—the Marquis was barred by no restraint from marrying another wife immediately after sentence, and so there was no law by which his children would have been rendered illegitimate; whereas Lord Roos was prevented from doing so by the Canon and the bond, from the binding cogency of which it was the object of the act apparently to relieve him.

According to the historians Burnet and Ralph, this bill was passed on political grounds, and with a political object; viz., to form a precedent which would enable Charles II. to separate from his first wife, by whom he had no children, and to marry a second wife, after that separation, for the purpose of excluding the Duke of York from the throne. However that may be, unquestionably the bill was contested stoutly; seventeen bishops opposed, and three only supported it.

**Macclesfield Case.**—The first example of an actual dissolution of the nuptial tie by Parliament was in the case of the mother of Savage, the notorious Countess of Macclesfield (*m*). In that case, the aid of the Legislature was sought, because in

(*k*) 13 State Trials, p. 1308.

(*m*) Macqueen's House of Lord's

(*l*) Macqueen's House of Lords Practice, pp. 551-562.

Practice, p. 574.

consequence of the skilful opposition set up by the Countess in the Spiritual Courts, and the narrow maxims which there prevailed, she contrived to baffle all her husband's efforts to obtain a sentence of divorce *à mensâ et thoro*. The circumstances of the case, however, were so scandalous and flagrant, that it would have been an outrage upon every principle of justice to withhold relief; at the same time it was so novel a proceeding to pass a bill of that nature, where there was not a sentence of divorce first obtained in the Spiritual Court, that a protest was entered against it by Lords Halifax and Rochester, because, as they said, they looked upon it as an ill precedent, and which might be of ill consequence in the future.

**Duke Norfolk's Case, (1700).**—The next instance of a legislative dissolution of marriage was in the Duke of Norfolk's case (n). There also a sentence of divorce was refused by the Ecclesiastical Court, although the Duke tried the experiment more than once. He recovered damages, however, at law, from the adulterer, Sir John Jermayne; and after his bill had been repeatedly rejected by the Lords, it became at last, in a new state of circumstances, successful in 1700. The leading counsel for the Duchess (Sir Thomas Powys) complained that this was the first instance where an attempt had been made to obtain a Divorce by Act of Parliament, without any sentence being previously obtained at Doctors' Commons. And the Duchess herself protested against it.

Such are the cases before the commencement of the 18th century, in which application was made to Parliament to get rid of the consequences of a prior marriage. The object of Mr. Lukenor's case was to prevent the evil of an illegitimate family being fathered upon him. The object in Lord Roos' case was to continue the succession, and probably the Peerage, in the male line. The object in Lord Macclesfield's and the Duke of Norfolk's cases was to give them that redress which the Ecclesiastical Courts had withheld or refused. In none of these cases, however, was Parliament asked without some special and peculiar reason to interfere in the matter. But

(n) Macqueen's House of Lords Practice, p. 562.

the precedent was set—the power was recognized and established—and very soon afterwards, that is to say, in 1701, it was so completely followed, that, without any special or peculiar reason a divorce *à vinculo* was granted in the case of Mr. Box, which may be considered as the first specimen of Parliamentary divorce practice. From that time to 1858 the legislature, in fact, constituted itself a Court for granting Divorces *à vinculo matrimonii*.

The petition of Mr. Box, as entered in the Lords' Journal of 1700, prays that he may have "leave to bring in a Bill to dissolve his marriage with Elizabeth Eyre, she having lived in adultery, as he hath fully proved in the Court of King's Bench, and obtained a definite sentence in the Arches' Court of Canterbury." The Bill was intituled "An Act to dissolve the marriage of Ralph Box with Elizabeth Eyre, and to enable him to marry again"—a title followed from that time to 1858. The measure passed in 1701.

**Inconvenience of the Legislative Form.**—Thus the right to obtain a divorce *à vinculo* was definitely established. It was established, however, in the rudest and most inconvenient manner; for the proceeding was a judicial one by a legislative process, and it had all the inconveniences which necessarily result from the discussion of such a question in a mixed and popular assembly.

**Standing Orders Framed for House of Lords.**—In 1798 Lord Chancellor Loughborough called the attention of the House of Lords to the propriety of laying down certain general rules, which should precede the consideration of every case, and with which all parties who came before them to seek a divorce should be bound to comply. Accordingly he framed a series of Resolutions; and by these Resolutions it was not only required that a sentence of divorce *à mensâ et thoro* should have been pronounced before soliciting the Bill, but that the entire proceedings in the Ecclesiastical Courts should be delivered in upon oath at the bar of the House of Lords. They further required that the petitioner should attend the House, in order, if necessary, that he might be examined as a witness, with reference to connivance or collusion, and also with reference to another point, namely—whether he was, or was not, at the time of the adultery, living apart from his wife, and whether he had not by deed or

otherwise, released her from her conjugal duty by withdrawing his marital authority and protection. These resolutions which were passed soon afterwards, had the effect of introducing a stricter practice than had previously obtained upon Bills of this nature. By a subsequent order it was provided that no Bill to disallow a marriage on the ground of adultery should be received without a clause prohibiting the marriage of the offending parties (*o*). But this clause was struck out in Committee or on the report, except in very peculiar cases.

Under ordinary circumstances, a Divorce Bill might be obtained at the suit of the husband but not at the suit of the wife. It could be obtained almost as a matter of right at the suit of the husband when the wife was convicted of infidelity and the conduct of the husband was irreproachable. But it could not be obtained at the suit of the wife except in cases of aggravated enormity, such, for instance, as incestuous intercourse with the wife's relations, which precluded the possibility of future reconciliation. In five cases of this description, Parliament interfered. Unless, however, there were circumstances of aggravation, constituting an exception to the general rule, it always declined to do so (*p*). Two propositions were therefore affirmed—first, that the wife had no title to ask for a divorce *à vinculo*, when she was aggrieved only by adultery; and secondly, that the husband, aggrieved only by adultery, could demand, as it were, *ex debito iustitiæ* a divorce *à vinculo* unless his own conduct had been censurable.

The provisions of a Divorce Bill were in the discretion of Parliament, and in this respect there is some advantage in bringing these questions under the jurisdiction of the Legislature, as other courts are bound by rules. Parliament may mould and adopt its relief according to the facts and exigencies of the case.

**Jurisdiction of Ecclesiastical Courts.**—From this review of the history of divorces in England, it would appear that the jurisdiction of the Ecclesiastical Courts on these points was twofold: they could decree a divorce *à mensâ et thoro*, being a

(*o*) Macqueen's House of Lords' Practice, pp. 509-792.

(*p*) In Miss Turner's case, a young lady, a minor, having been enticed away from school and married under

representations peculiarly based on fraudulent, Parliament passed a Bill dissolving the marriage.—Macqueen's House of Lords' Practice, pp. 475 and 642.



lawful separation of husband and wife made by a competent judge, on due cognizance, of the cause and sufficient proof made thereof; they could pronounce a sentence of nullity, declaring that the show or form of marriage had between the parties was null and void from the beginning—that no legal tie ever existed.

**Parliamentary Divorce.**—A divorce *à vinculo* or the dissolution of a lawful marriage was not down to 1858, obtainable in any court of law, but only by a special Act of the Legislature (*g*). With respect to Parliamentary Divorce, three distinct tribunals had to be resorted to—a court of law for damages against the adulterer; a Court Ecclesiastical for divorce *à mensâ et thoro*; and the Imperial Parliament for a dissolving statute or the divorce *à vinculo*. The great expense and long delay of these proceedings was a grievous hardship and oppression on individuals, and they amounted in many cases to a denial of justice. The total cost under the most favorable circumstances of obtaining a divorce *à vinculo* could hardly be less than £700 to £800, and when the matter was much litigated it would probably reach some thousands. To redress the evil resulting from a system entailing such enormous expense, the Commission referred to in the beginning of this chapter, was appointed to enquire into the law of divorce.

**Establishment of a Divorce Court.**—The Commissioners made a report recommending (1) that the dissolution of marriage should no longer be granted by the legislature but by a court; (2) that the court should consist of three judges; (3) that dissolution of marriage should be allowed to a husband for his wife's adultery, but as a general rule not to a wife for his adultery, although she might have dissolution of marriage "in cases of aggravated enormity, such as incest or bigamy." Finally the Commissioners advised that in suits for divorce *à mensâ et thoro*, the existing grounds for adultery and cruelty should have added to them the further one of desertion.

In the session of 1853 the report having been submitted to the Queen, was by Her Majesty's command laid before the two Houses of Parliament.

(*g*) Swabey's Law of Divorce, 1858,  
p. xxiii.

Early in June, 1854, the Lord Chancellor, on behalf of the government, presented to the House of Lords a bill founded on the Commissioners' report, but materially differing from it. It allowed dissolution of marriage to a husband for his wife's adultery, but not to her for *his* adultery. She was, however, to have a dissolution of her marriage when the husband, "since the celebration thereof, had been guilty of incest or bigamy." For all other conjugal offences the wife was to be content with divorce *à mensâ et thoro*.

After debates in the Lords this bill was abandoned after the second reading.

On the 11th of March, 1856, the Lord Chancellor presented a bill intituled: "An Act to transfer the jurisdiction in Matrimonial causes and to establish a Court of Divorce." This bill passed the House of Lords, went to the Commons and, after having been read a first time, like its predecessor of 1854, was abandoned for the session.

On 13th February, 1857, another bill was presented, but its career was stopped by the sudden dissolution of parliament in April, 1857.

In the new parliament, on 28th May, 1857, the Lord Chancellor presented another bill which became law, and which with some amendments is now the system under which relief is granted in England in all matrimonial matters. During the passage of the bill through the House of Lords, Lord Lyndhurst supported an attempt made to give relief to the wife for the husband's adultery, but the amendment was rejected. A protest urging the injustice and hardship of this denial of equal rights to the wife was signed by him and other peers.

The result was, the constitution in 1858, of the Court of Divorce and Matrimonial Causes. Power was given that tribunal in certain cases, and for certain specific reasons, to grant a divorce and dissolution of the marriage tie, and by the Judicature Act that jurisdiction has now become vested in the High Court of Justice, and is administered in the Probate and Divorce Division. The old Ecclesiastical jurisdiction, except in respect to marriage licenses, now vests in the above Division; therefore the jurisdiction of the Divisions, where established, is sole and complete in

all matters relating to Marriage. What those matters are, may be gathered from the Act itself. They are (i) suits for dissolution of marriage, formerly divorce *à vinculo matrimonii*; (ii) nullity of marriage; (iii) judicial separation, formerly divorce *d mensâ et thoro*; (iv) restitution of conjugal rights; and (v) jactitation of marriage. The Division has also further jurisdiction, created by the above, and extended by subsequent amending Acts, in relation to other matters, arising out of the above proceedings or incidental to them. These are as follows:—(vi) alimony in certain cases; (vii) custody of children; (viii) the application of damages recovered from an adulterer; (ix) the settlement of the property of the parties; (x) the protection of the wife's property in certain cases; and (xi) the reversal of the decree of judicial separation, and the decree *nisi* for a divorce, and a similar decree of nullity of marriage (q).

**Parliamentary Divorce in England since establishment of Court, 1857.**—Although since the passing of this Act divorces of English marriages have become a judicial instead of a legislative proceeding, Standing Orders still provide a procedure for bills of this nature in Irish and other cases. There is nothing, indeed, to prevent a husband or wife of English domicile from applying to Parliament for a divorce under circumstances not provided for by the Act, as in the case of desertion, of incurable insanity on either side, or a husband's adultery with aggravations stopping short of legal cruelty. It would, however, be hard to repel arguments founded upon the absence of any such remedy in the general law, and the expediency of seeking to amend that law instead of asking for a *privilegium*. No applications for private divorce Acts have been made since 1857 by married persons domiciled in England. But a private Act obtained by an Irish lady (Westropp's Divorce Act,) in 1886 is of importance in showing that Parliament has relaxed its old and strict rule against allowing divorce to injured wives, unless in most exceptional cases. According to former precedents, the cruelty and adultery proved in 1886, would have been wholly ineffectual to procure a private divorce Act. But in this instance the House of Lords exercised its old jurisdiction in the spirit of the legislation of 1857 (r).

(q) Dixon on Divorce pp. 2, 3.

(r) Clifford's Private Bill Legislation, Vol. 2 p. 771.

**Divorce in Ireland**—The jurisdiction of the Ecclesiastical Courts in Ireland was transferred to a court appointed under the Matrimonial Causes and Marriage Laws (Ireland) Amendment Act 1870, but no power was given that court to grant an absolute divorce; it can only grant a judicial separation or divorce *à mensâ et thoro*. To enable an Irishman to obtain a divorce *à vinculo matrimonii*, the proceeding is first—to obtain a verdict at Common law against the adulterer, then to obtain a judicial separation from the court constituted under the Act of 1870, and then to introduce a bill into the House of Lords on behalf of the petitioner, praying for a dissolution of the marriage. If the wife is petitioner, the action at law is, of course, inappropriate.

**India.**—With regard to India, it was found that attendance before Parliament of natives of that country as witnesses to prove adultery, would be attended with extreme difficulty owing to their religious prejudices. Accordingly in 1820 an Act was passed providing for the examination of such witnesses under a Commission before Supreme Court Judges in India, and upon the return to the Speaker of the House, of the Commission, the evidence was admissible.

Of late years, however, the High Courts of the several Indian provinces have acquired jurisdiction under certain conditions to grant divorces to residents in India—a jurisdiction which is in many cases concurrent with that of the English Court.

Since 1st January 1858, when the Act constituting the Divorce Court in England came into force, 15 divorce bills from Ireland and India have been introduced in the House of Lords.

## CHAPTER II.

### HISTORY OF DIVORCE IN CANADA.

IN response to the demand of the Canadian people for constitutional privileges, an Act (*a*) was passed by the Imperial Parliament for the adjustment of affairs in the Colony, and under it two Provinces were erected, and in 1792 the new Constitution inaugurated.

In conferring the Constitution on the two provinces of Upper and Lower Canada, the avowed object was to assimilate the Constitution of Canada to that of Great Britain, as nearly as the difference arising from the manners of the people, and the then situation of the Province would admit. It will be seen from the last chapter that at that date there was no divorce law in England and in the early existence of the Provinces of Canada there could have been little occasion for it, indeed, it was not until the session of 1833-34 that the mention of divorce occurs in the annals of Canadian legislation. In that session a bill was presented to the Legislative Assembly of Upper Canada, "to enable married people to obtain divorce in certain cases." What grounds were to entitle to this relief the records do not show. The measure was dropped before it reached a second reading.

Two petitions for bills of divorce were presented to the same House in 1836, but no action was taken upon them.

**John Stuart's Case**—In John Stuart's case in 1839, we have the first instance of Parliamentary Divorce in Canada: the application being made to the legislature of Upper Canada. The petitioner's wife committed adultery and eloped with the adulterer against whom the petitioner recovered judgment in the Court of Queen's Bench for £671.14.3. The bill was introduced in the

(a) 31 Geo. III. c. 31.

Legislative Council, but the Journals of that time afford no information further than the fact that the bill was passed according to a procedure almost identical with that observed in the Senate of Canada prior to 1888. When the bill reached the Legislative Assembly, an unsuccessful attempt was made to defeat it by a proposal to refer it to a Select Committee, and subsequently a motion to reject it upon religious grounds was negatived on a vote of 10 to 30. The bill passed without amendment.

After the Union of the two Provinces in 1840, two further applications for Divorces were made to the Legislature of United Canada but were abandoned at an early stage.

**Harris Bill—want of Domicil**—In 1845 the Harris Bill passed in both Houses. This case is of some importance as authoritatively settling a point in the law of Domicil. The facts were as follows. The marriage took place in Canada in 1832. Petitioner was at that time residing here, as an officer attached to his Regiment; the act of adultery on account of which the petitioner sought a divorce was committed in Canada; the petitioner had no other domicil in Canada than such as attached to him in his military capacity; in 1841 he returned with his Regiment to England and did not afterwards reside in Canada. Mrs. Harris had also quitted Canada for the West Indies; the bill passed in 1845, during the absence of both parties from the Province, and was reserved for Her Majesty's approval. The opinion of the Law officers of the Crown was that the parties were not domiciled in Canada at the time of the passing of the Act. The bill was accordingly disallowed, and it stands as the only instance of a Canadian Divorce bill being disallowed by Her Majesty. The introduction of this Bill afforded the Roman Catholic Legislators their first opportunity of opposing divorce. A lively discussion culminated in a written protest by the minority being put on record after the bill had been voted upon.

From this date to the Confederation of the Provinces in 1867, only three unimportant bills were passed, each by narrow majorities (*b*). These too were also vigorously opposed by the Roman Catholic Legislators.

(*b*) Beresford, 1853; McLean, 1859, and Benning, 1864.

### **Standing Orders adopted by Legislative Council.—**

At the time the Stuart and Harris bills were passed, the Legislative Council was without Standing Orders regulating procedure in connection with Divorce Bills, and recourse was then had to the Rules of the House of Lords. It was not until 1847 that Rules or Standing Orders were adopted. These Rules embodied no full procedure but Rule 70 was as follows:—"That in all unprovided cases reference should be had, as far as practicable, to the Rules and Regulations or decisions of the House of Lords; and for this purpose, till further orders, the practical Treatise on Parliamentary Divorce, by John Macqueen, Esquire, Edition of 1842, shall be deemed a sufficient authority."—*Journals of Leg. Council*, (1847.)

In 1858, a motion for the appointment of a select Committee to draft a bill providing that jurisdiction be given to a proper legal tribunal in Upper Canada in cases of divorce, with power to decree the dissolution of marriage, was negatived by 65 to 34 in the House.

In the following year (1859), Mr. Ogle R. Gowan obtained leave to bring in a bill for the establishment of a Court of Divorce and Matrimonial Causes, but the bill did not go beyond a first reading.

**Imperial Government Recommends Establishment of a Court.**—During the same session, a copy of a despatch addressed to the Governor General by the Imperial Government, recommending action in the law of divorce, was laid before the Assembly. In transmitting His Excellency a copy of the Act of the Imperial Parliament relating to the law of Divorce and Matrimonial Causes in England, which had just then become law, the Secretary for the Colonies called attention to the great importance of the subject. Her Majesty's Government regarded this subject as within the general class of internal affairs which the duty and right of regulating belonged to the Colonial Legislature under free institutions, but they were at the same time fully sensible of the great importance of uniformity of legislation on this head, so far as it could be attained without injury to these principles of Colonial Government, and the danger as well to public morality as to family interests which might arise from the law of the Colonies on the subject of Marriage and Divorce

differing materially from that of the Mother Country and of each other. His Excellency was recommended to consult with his Council as to the expediency of at once introducing a measure which should incorporate, as nearly as the circumstances of the country would admit, the provisions of the Act then recently passed in England, establishing a Divorce Court, but no action seems to have been taken by the House.

In 1860 another attempt was made by a petition from residents of the City of Quebec praying that the law of Divorce then recently adopted in England be adopted in Canada, but the matter got no further than the first preliminary step.

**Divorce in Canada after passing of B. N. A. Act 1867.**—Up to 1867, the Legislature of Canada, in passing special Acts to dissolve marriages, exercised the like power in that respect as the Imperial Parliament, subject to such bills being reserved for the assent of the Sovereign. In that year when a new Constitution was conferred by the B. N. A. Act, 1867, upon the Dominion of Canada, the subjects of Marriage and Divorce were by that Act submitted to the exclusive legislative authority of the Parliament of Canada, and by virtue of this power, Parliament has ever since exercised authority on these subjects over the Dominion. In the Provinces of Nova Scotia, New Brunswick, Prince Edward Island and British Columbia (c), Courts for the dissolution of marriage existed prior to their entry into the Federal Union. The next chapter will treat briefly of these Provincial Courts.

**Meaning of word Marriage under the B. N. A. Act.**—

As interpreted by resolution passed at the Quebec Conference, at which were settled the principles upon which the Union of the several Provinces afterwards took place, the word "Marriage" here invests "the Federal Parliament with the right of declaring what marriages shall be held and deemed to be valid throughout the whole of the confederacy of Canada, without, however, interfering in any particular with the doctrines or rights of the religious creeds to which the contracting parties may belong, or, as summed up by Sir Hector Langevin, then Solicitor General,

(c) The circumstances under which the Court in this Province assumed jurisdiction are peculiar, see *post* p. 37.



East (1865) "The Central Parliament may decide that any marriage contracted in Upper Canada or in any of the confederated provinces, in accordance with the laws of the country in which it was contracted, although that law might be different from ours, should be deemed valid in Lower Canada in case the parties should come to reside there, and *vice versa*" (d).

"This is nothing but the application between the Provinces of public international law, namely, that a marriage in any one Province should be equally binding on all" (e).

**Meaning of the word Divorce under B.N.A. Act**—The primary meaning of "Divorce" is *separation*. As used in the B. N. A. Act it means dissolution of the bonds of matrimony—the separation by law of husband and wife, and under the power thereby given to "make laws in relation to marriage and divorce," the Parliament of Canada has since exercised itself in passing numerous Acts for the dissolution of marriage. Perhaps, as has been observed, it was conceived that the power to do so would be delegated by Parliament to a Court or Courts constituted for the purpose, as had been done some few years before in England. But the Parliament of Canada has not seen fit to do so, and the legislative results have been special Acts for divorce in individual cases : following the course of the Imperial Parliament before the passing of the Divorce Court Act.

**Number of Bills passed in Canada**.—Since the passing of the B. N. A. Act, 1867, down to the present time (1888), the Parliament of Canada has passed twenty-three bills dissolving marriage because of adultery ; two bills annulling marriages which had not been consummated, and which had been solemnized under circumstances amounting to fraud, and one bill granting a separation of the parties, equivalent to the divorce *à mensâ et thoro* as administered formerly by the Ecclesiastical Court in England. During the same period Parliament has rejected ten applications, which, although charging adultery, the petitioner either failed to establish sufficient grounds for relief, or the case presented circumstances which in the opinion of Parliament formed a bar to the relief sought.

(d) Confederation Debates 1865,  
p. 388.

(e) Confederation Debates, 1865,  
p. 579. Hon. Mr. Cauchon.

**Principles and Extent of Relief granted.**—In dealing with these applications Parliament has distinctly followed a course in keeping with the principle thus laid down in the House of Lords by Lord Thurlow in the Addison case : “Divorce might be granted in a great variety of circumstances ; their Lordships in such cases governing themselves by the exercise of their own wisdom and discretion” (f). While looking to the precedents of the House of Lords for light, our Parliament has never bound itself by any hard and fast rule to limit the measure or extent of its relief to the grounds which guided the House of Lords. That House never granted a divorce *à mensâ thoro*, as was done in Canada in the Campbell case, probably because the Ecclesiastical Court, then in existence, had the necessary power. Again, the House of Lords always refused relief to the wife for the adultery of the husband, except in cases coupled with misconduct of the husband of the most aggravated character, such as incest and bigamy with adultery. For the simple adultery of the husband the wife had no remedy whatever. The Canadian Parliament on the other hand, has repeatedly granted relief to the wife for the adultery of the husband without the aggravating circumstances looked for as a necessity by the House of Lords, and in doing so, we have, by some years, preceded the Imperial Parliament in recognizing the right of the wife to equal relief with her husband, for it was not until 1886 that the Legislature in England saw fit to grant a divorce to a woman upon grounds that would not, 25 years previous, have secured her relief.

It is said divorce ought not to be encouraged, as granting it too easily may beget loose sentiments with respect to the matrimonial tie. This is true, no doubt ; and it suggests the necessity of exercising strict vigilance and circumspection in allowing divorce to either sex ; but it furnishes no ground for drawing a distinction between the respective claims of the married parties—no reason for granting to the husband a remedy withheld from the wife (g).

**Attempts to Establish a Divorce Court for Canada.**—Apart from the discussions on the merits of the various bills

(f) Macqueen’s Practice of the House of Lords, p. 476.

(g) This important question will be noticed specially in a subsequent chapter.

submitted to Parliament, the subject of divorce has come before both Houses in other forms since the Federal Union.

In 1870 the then Minister of Justice, Sir John A. Macdonald, introduced a Bill relating to the Court of Divorce and Matrimonial Causes in New Brunswick, for the purpose of making provision for the administration of the Court in case of the disability of the Judge thereof from relationship or other cause. The motion for the third reading gave rise to a lengthy debate. Strong opposition was made to the Bill, many urging that if it passed, the step would be preliminary to the establishment of a general divorce court for the Dominion. An amendment "That the Bill be not read a third time, but that it be resolved that the Divorce Court of New Brunswick should be abolished" found so many supporters, that the Minister moved the adjournment of the debate, and a few days later he withdrew the Bill altogether (*h*).

In the Session of 1875, Mr. DeCosmos, M.P., introduced in the House of Commons a resolution "that relief in all matters matrimonial would be best secured by creating a court in each of the Provinces with exclusive jurisdiction in matters matrimonial, and with authority in certain cases to decree a dissolution of marriage." A short debate revealed the fact that while the leaders of both parties in the House (Hon. A. Mackenzie, Premier, and Sir John A. Macdonald) were not opposed to the granting of divorces under any circumstances, they were of opinion that additional facilities for obtaining them should not be given. The motion was then voted down (*i*).

Late in the Session of 1879 a motion was made in the same House for leave to introduce a bill to enable the Court of Chancery in Ontario to dissolve the marriage tie in certain cases. Opposition upon religious grounds at once developed itself, but discussion was cut short by the second speaker objecting to the introduction of the Bill in the expiring hours of the session. The Bill was at once negatived on a division.

In the Session of 1888, Hon. Messrs. Jones and Davies urged that steps should be taken to remove from Parliament the duty of granting divorces. In reply, the Premier, Sir John

(*h*) Debates of House of Commons  
1870, p. 696.

(*i*) Debates of House of Commons  
1875, p. 859.

A. Macdonald, said that he was opposed to a divorce court, because if one were established the number of applications would greatly increase. That had been the experience of England, and of those who once strongly supported the establishment of the Divorce Court and the transfer of the trial of divorces from the Legislature to the Court, very many had seriously repented their advocacy of that measure, because the number of divorces, the corruption of society and the number of collusive trials are increasing to the annually increasing degradation of the public mind. He preferred our system which offers very considerable impediments to the granting of divorces, to the systems which prevail elsewhere.

And the following day, in the Senate, the Honorable Mr. Gowan took occasion to express his concurrence in the views enunciated by the Prime Minister, giving his reasons against the establishment of a Court. Referring to the points of difference between the two procedures for divorce in Parliament, and before a Court invested with power to dissolve marriage, he said :—

“The proceedings by Private Bill for divorce, designed like  
“other bills to attain its completion in an Act of Parliament, to a  
“certain extent bear some analogy to a suit in a Court of Justice,  
“but it is not merely a proceeding between party and party, though  
“the primary immediate operation of the particular law will be  
“upon them. It is not a mere civil proceeding : the Act dissolves  
“the marriage of the parties, it also punishes the matrimonial  
“crime committed by one of them. It may in a sense be said to  
“be a proceeding in *rem*, the *res* being the marriage. Indeed I  
“would say it is neither contractual nor purely penal, the opera-  
“tions being in respect to the marriage *status* of the parties, a  
“divine ordinance as well as a domestic regulation which the law  
“has sanctioned and has the power to regulate and control under  
“the Constitution.

“And these considerations must be kept in view in a ques-  
“tion whether it is expedient to change the present legislative  
“mode of dealing with divorce and commit the subject to be  
“wholly dealt with by a Court of Judicature, constituted for the  
“special purpose. Let me take a glance at both.

“In entertaining applications for divorce and making a law

“to set the parties free to marry again—changing their *status*—  
 “Parliament can properly bring in view considerations of expediency or public advantage. A court of justice is necessarily  
 “restrained within fixed limits and its procedure controlled by  
 “fixed rules in matters assigned to it for adjudication between  
 “party and party.

“Parliament would be making a law, and the supreme power  
 “of the state (within constitutional limits of course) it would have  
 “to consider what would most tend to the public good. The  
 “courts but expound and administer law which Parliament  
 “enacts.

“The point is forcibly put by a learned writer on the sources  
 “of law, ‘the functions of the legislator are in reality not legal  
 “but moral. With him the primary enquiry is, what ought to  
 “be? And he only enquires what is, to suit his provisions to  
 “the law already in force. With the lawyer, on the other hand,  
 “what is, is always the primary enquiry, and there his enquiry  
 “stops.’

“’Tis true, applications for divorce have always been based  
 “upon a specific charge, and the facts necessary to support that  
 “charge established by satisfactory evidence, and so far the proceeding is *quasi judicial*. Inquisition is made and the truth or  
 “falsity of the facts alleged determined, and to that extent there  
 “is an analogy to the proceedings of a court. But whether, by  
 “reason of the facts proved, the prayer of the petitioner should  
 “be granted, opens considerations for Parliament which could  
 “not be permitted to judges when called upon to pronounce  
 “what the judgment should be.

“Further, in criminal cases the Executive may be called  
 “upon to decide whether, in view of all the facts and circumstances, the judgment of the court should be carried in effect or  
 “modified.

“Now, Parliament may be said to unite in itself all these  
 “three duties and functions. It decides whether the charges are  
 “proved, whether they constitute such a case as should entitle the  
 “party to a special Act for relief, and what relief, if any, should  
 “be granted to the party, in view of all the circumstances; and  
 “Parliament may, and ought always, to have in regard, not merely  
 “the question as it affects the parties, but the effect in relation to

"morals and good order—the effect which the passing a particular law might have upon the well-being of the community. Parliament as the supreme power has its duties and responsibilities, and cannot compromise the well-being of society which has been entrusted to it under the Constitution.

"These are the considerations which brought me to the conclusion that in the present aspect of the question any delegation of the power respecting divorce would be inexpedient.

"Parliament can deal with matters in the abstract ; judicial decisions are by their very nature concrete, and all the judge professes to do is to decide the case before him on ascertained legal principles" (j).

**New Rules of Procedure Adopted by Senate.**—In the same Session, the Senate reformed its Standing Orders or Rules of procedure concerning Divorce bills. The system of procedure, incongruous, tedious and unsatisfactory, was a subject of constant reproach. The investigation of a case was divided between the House, and a Committee which was almost always selected by the promoter of the bill, and the hearing of the evidence was conducted without regard to any settled rules of evidence. The new Rules of procedure as adopted April, 1888, effected changes in these and other particulars, but without in any degree diminishing the power of the House to deal with the case at any of its stages (k).

**Effect of American Divorces in Canada.**—Parliament has, upon two occasions, considered the effect of divorces obtained by Canadians in the United States. In the Birrell case (1886), the husband, through gross fraud, obtained a sham divorce in Michigan from his wife on the alleged ground of her desertion, and subsequently he went through a form of marriage with another woman. The exposure of the fraudulent character of the husband's conduct and his subsequent adultery restricted discussion on the effect of American divorces in Canada.

In the Ash case (1887), however, the subject was thoroughly discussed. The facts of this case were as follows :—Manton married Susan Ash in Kingston, Ontario, in 1868 ; she lived with him there for six weeks, and then left with his consent

(j) Senate Debates, 1888, p. 734.

(k) The speech of Senator Gowan on introducing the new Rules will be found extremely interesting and valuable. Senate Debates, 1888, pp. 55-68.

to visit her father in Montreal. On her return six weeks later she found his property had been sold, and he had given up housekeeping. She resided with him at his boarding house, but his intemperate habits rendered life with him intolerable, so she left him shortly afterwards, this time without his consent, and returned to her father's in Montreal, where she had since continuously resided. Manton went to the States, and in 1874 obtained from the Court of Massachusetts a decree of divorce from Susan Ash, on the ground that she had deserted his home. There was no evidence of his residence there other than the recital in the decree, which, being put in evidence in the application to Parliament, recited that for the period of five consecutive years preceding the time of his application to the Massachusetts Court, Manton had resided in Boston. On 3rd September, 1874, Manton married again at Stirling, Ontario, a woman named Hatch, and they removed at once to Boston, remained there living as husband and wife, and had a family. Susan Ash founded her application upon this decree of divorce, alleging that the decree being for a cause not recognized in Canada, it was null, and therefore the second marriage bigamous.

It was here clearly settled that under no circumstances would Parliament recognize an American Divorce as valid and conclusive in Canada. The opponents of the Bill argued that as a matter of international comity we were bound to give effect to decrees of a foreign court, but the Leader of the House (Senator Abbott) stated the principle, which was ultimately sustained by both Houses, to be, that as the Parliament of Canada has not yet recognized the power of any court to deal with the subject of divorce, there is nothing binding in the argument which claims, by the comity between nations, for a judgment by a foreign court, that kind of consideration and recognition by the Senate which that judgment would have before an ordinary tribunal, upon a matter the subject matter of which was common to both (1). The principle involved in the term "comity of nations" is that as the jurisdiction over the subject matter of the judgment is common to the courts of both countries, we give it by courtesy that consideration and weight involved in regarding it as *prima facie*, a correct judgment.

(1) Senate Debates, 1887, p. 224

**Views of Legislators opposed to Divorce upon Religious Grounds, as expressed in Parliament.**—A large proportion of the Canadian legislators, Senators and Members of the House of Commons, profess the Roman Catholic religion, and as is well known, many of them are opposed to dissolving the marriage tie upon any ground whatever. On account of the views entertained by this body, the framers of the B. N. A. Act found much difficulty in dealing with the subject.

The late Sir George Cartier, in explaining the matter, said that at the time of the formation of the Confederation, the question of divorce had been left purposely to be decided by the Federal Parliament, which had a Protestant majority, and taken away from the Legislature of Quebec, the majority of which was Catholic, because it was against the creed and conscience of Catholics to vote for divorce in any circumstance whatever. This was done in order that justice might be done to Protestants. The Catholic bishops of Canada, knowing that the inhabitants of Canada formed a mixed community, approved of this course, and he (Sir George) had reason to believe the Holy See did so too. The conclusion arrived at was with a view to the protection of minorities, otherwise the minorities in Ontario, Nova Scotia and New Brunswick could have no claim to their rights being respected in the same manner as they are now (*m*).

Acting in the spirit of this compromise, the gentlemen professing the Roman Catholic religion do not manifest more than a passive opposition, except in cases where it is necessary to protest against the proceedings. The opinions of several have found expression in Parliament. Some oppose divorce on religious and social grounds; others, without any desire or intention to invade any rights of their fellow members in a matter of this kind, do so to mark their conscientious feelings. Some, while adhering to the doctrine of indissolubility of the marriage tie upon any ground whatever, are prepared to support, in proper cases, a separation of the parties as far as civil obligations are concerned, but prohibiting either of the parties from marrying again during the lifetime of one another. A fourth set take the ground that while they have the right to vote on the question, it is unbecoming in

(*m*) Dominion Parlt. Debates 1870,  
p. 694.



Roman Catholics to interfere and deprive Protestants of the right to obtain bills of divorce, but that the Protestants should be allowed to legislate as they please on the subject. Obstruction would be interfering with the law of the land, and an enforcement of religious opinions upon the Senate (*n*).

On the occasion of his remarks upon the advantages of the Parliamentary over the Judicial system of divorce, above alluded to, Hon. Mr. Gowan also touched on this subject as follows :—

“An argument has been used against the Parliamentary procedure. It was said persons were appealing for relief, in such cases, to a body, many members of which are opposed to divorce *under any circumstances*, and should that opposition assume an active form, applicants would be at a disadvantage in case of a vote ; for practically a bill of divorce could not pass by a majority of voices, like other bills affecting rights and liberties, but requires nearly four-fifths of the non-Catholic vote of the body to carry in a full House. I was given to understand it was considered ‘being a Federal matter, the question might be dealt with by Protestant members, the Roman Catholics not taking any action in the matter ; and it was advised to Roman Catholic members to be altogether passive except in cases in which it would be necessary to protest against an action.’

“I may be mistaken in this, if so, I regret it, for the fact I have referred to offers, in my opinion, the only show of argument for changing the present system (*o*).”

(*n*) Senate Debates, 1875, pp. 293,      (*o*) Senate Debates, 1888, p. 797.  
373.

## CHAPTER III.

### MARRIAGE.

EMINENT lawyers and divines have, from time immemorial, explained the nature, origin, and characteristic features of the marriage tie; and opinions have been much divided as to whether it should be regarded as a merely civil compact or as a religious and spiritual union.

Various views have also cropped out in debate in the Senate and the Commons, but any detailed presentation or consideration of them would be outside the range of this work; yet the subject being germane, the writer thought such brief exposition as could be compressed in a note touching the contractual and *status* theories, would be interesting, and he accordingly sought such from an Honorable gentleman who has given much attention to the subject: the substance of his remarks are subjoined.

“To speak of marriage as a civil contract is misleading, and pernicious in tendency. Marriage is a Divine ordinance and not a mere contract or partnership; mutual consent is necessary, but mutual consent does not make a marriage, It is a *state* into which mutual consent *admits*. It affects the *status* by making a man and woman one person. It is God, not man, who joins together; man’s part is to effect a union between two—God’s to create out of them a unity.

“The mutual duties of marriage are inseparable from the state into which the contract admits, but their obligations rest primarily and supremely on their duties of that state in the abstract, antecedently to, and independent of any actual contract whatever: secondarily and incidentally only on their being virtually included in the contract of admission thereto. Marriage at one and the same moment satisfies and ends the contract and initiates the *status* with all its obligations. The doctrine was

“forcibly presented by Lord Justice Brett in the Mordaunt  
 “Divorce Case, (a) thus: ‘Marriage is not, as is often popularly  
 “stated, a contract. If it were it could, according to every  
 “principle of the law of contracts, be rescinded by mutual con-  
 “sent. But it cannot. There is a contract before marriage,  
 “which is a contract to marry; but marriage is the fulfilment of  
 “that contract, which is then satisfied and ended, and there is no  
 “further contract. Marriage imposes a *status* which was by the  
 “law, before the Statute, (the Divorce Court Act,) imposed  
 “upon the person forever.’ And so by the law of England,  
 “before the establishment of the Divorce Court, it required an Act  
 “of Parliament to alter this *status*—to dissolve the marriage state:  
 “under the Divorce Court Act a judicial separation is allowed in  
 “certain cases.

“In the Provinces of Ontario, Quebec and Manitoba, where  
 “no Divorce court exists, divorce *à vinculo matrimonii* is only  
 “obtainable by an Act of Parliament: the Legislature of the  
 “Dominion in the exercise of its supreme power under the  
 “Constitution, making a law—passing a special Act, for the  
 “purpose in each particular case.

“It has been fairly urged that if marriage could be regarded  
 “as but a contract, its nature, obligation and privileges must be  
 “sought in the terms of the contract: but it is an estate, and as  
 “such they must be sought in the nature of the estate as insti-  
 “tuted and expounded by the founder, that is found in the word  
 “of God.

“The divine law as revealed by our Incarnate Lord allows of  
 “divorce or ‘putting away’ for one cause, adultery, and for one  
 “cause only as most Christians hold. This sufferance of divorce  
 “is not inconsistent with the conception of the state of a life long  
 “union of man and wife as devised by the Founder—nor does  
 “divorce by human law violate the injunction ‘What God hath  
 “joined let not man sever’ Applied to divorce for adultery it  
 “has no force since that is a cause of severance which is not of  
 “man’s devising, but is the special provision of God under the  
 “Christian dispensation. What is marriage? It consists of two  
 “becoming one flesh; adultery destroys this unity. So if it be

(a) 2 P. and D. (1870), p. 103.

“objected that neither the will of the individual nor the operation  
“of law can dissolve a bond like this, the reply may be No!  
“unless where the permission originates from the very source by  
“which the bond was sealed. A compact which God has rati-  
“fied, cannot be severed save for the cause which He has  
“declared as demanding and justifying the measure. Admitting  
“fully the divine institution and sacredness of marriage—the one-  
“ness of husband and wife—does not adultery destroy the unity,  
“make them cease to be one flesh by making that of the one  
“common to that of a third person? The union is *ipso facto*  
“dissolved by the very nature of the crime.

“The matrimonial sin is not punishable as a crime under  
“our law, but divorce is recognized as a secular and temporal  
“consequence of adultery and the process for it concerns public  
“order. The dissolution should be formal and notorious in  
“whatever manner the facts may be established; and so legal  
“divorce, whether legislative or otherwise, is but the judicial  
“ascertainment and declaration of the facts, the formal adjust-  
“ment and announcement of the *true* status of the parties by  
“reason of the crime found. Moreover Christian marriage and  
“the purity of the family is essential to the existence and well-  
“being of society and, if for no other reason than to secure its  
“own order and tranquility, it follows that society should invest  
“it with its amplest safeguards. If the supreme power in the  
“State does not delegate to a subordinate its paramount authority  
“in this particular, Parliament is bound to exercise itself as  
“occasion may require.”

## CHAPTER IV.

### NOTES ON THE PROVINCIAL DIVORCE COURTS, AND SOME OF THE POWERS INCIDENT TO MARRIAGE, EXERCISED BY COURTS OF LAW IN THE PROVINCES OF THE DOMINION OF CANADA.

THE power conferred upon the Parliament of Canada, by the B. N. A. Act, 1867, in respect to Marriage and Divorce, has not yet been exercised to its fullest extent, in that certain judicial tribunals in certain provinces are still permitted to continue a jurisdiction in matters matrimonial which was conferred upon them by Provincial Statutes before the passing of the B. N. A. Act, 1867. For convenience sake, the powers of these Courts will be here glanced at before passing to the discussion of Parliamentary Divorce.

Under section 129 of the B. N. A. Act, 1867, "All laws in  
"force in Canada, Nova Scotia or New Brunswick at the Union,  
"and all Courts of Civil and Criminal jurisdiction, &c, existing  
"therein at the Union, shall continue in Ontario, Quebec, Nova  
"Scotia and New Brunswick respectively, as if the Union had  
"not been made; subject nevertheless (except with respect to  
"such as are enacted by or exist under Acts of the Parliament of  
"Great Britain or of the Parliament of the United Kingdom of  
"Great Britain and Ireland) to be repealed, abolished, or altered  
"by the Parliament of Canada, or by the Legislature of the  
"respective province, according to the authority of the Parlia-  
"ment or of that Legislature under this Act."

Section 146, extends the provisions of the Act to other provinces admitted to the Union.

The provinces of the Dominion in which the Parliament of Canada has not yet repealed or altered the statutes in respect to Marriage and Divorce which were in force at the time of their entry into the Union, are Nova Scotia, New

Brunswick, Prince Edward Island and British Columbia. What bearing the powers conferred upon Parliament by sections 91 and 129 of the B. N. A. Act, may have upon Courts of Divorce established by statute in these provinces, it is difficult to say, as the matter has not yet presented itself for either judicial or legislative interpretation. In the absence of anything authoritative on the subject, the writer limits his remarks in this chapter to a brief description of what appears to be the present position of the Divorce Court in each of the provinces possessing one, and in the case of those not possessing such a Court, to a glance at some of the incidental powers exercised by the Superior Courts of law in respect to the subject of Marriage.

#### NOVA SCOTIA.

By Rev. Stat., N. S., 3rd Series, cap. 126, a Court of Marriage and Divorce was established in Nova Scotia, and consisted of the President, Vice President and members of the Executive Council of the Province, but the Vice President and any two of the Council were sufficient to constitute the Court. The Governor of the Province was President, and he had power to appoint the Chief Justice or any judge of the Supreme Court, Vice President. The Court had jurisdiction to declare any marriage null and void for impotency, adultery, cruelty, precontract or kindred within the degrees prohibited by Stat. 32, Henry VIII, cap. 38, touching marriages and precontracts.

In 1866 (29 Vic., N. S. cap. 13) the style of the Court was changed to the Court for Divorce and Matrimonial Causes; the then Vice President to compose the Court and to exercise the powers thereof under the title of Judge in Ordinary. On a vacancy occurring, the Judge in Equity for the time being was to become Judge Ordinary of the Court. The grounds for relief remain unchanged except that no marriage can be decreed null and void by reason of precontract. The powers conferred on the Court for Divorce and Matrimonial Causes in England were extended to this Court and the principles and practice that prevail in that Court were incorporated therewith as far as suitable and appropriate. The action of Crim. Con. has not, however, been abolished. Provision is made for appeal from the decision of the Judge to the Supreme Court of Nova Scotia.

The Act of 1866 provided that during the illness or temporary absence of the Judge Ordinary, the Governor in Council might appoint the Chief Justice or one of the Judges of the Supreme Court of the province to act as Judge Ordinary, and by an Act passed in 1870, this last power was further extended to meet the case of his being prevented from presiding by any disqualifying cause. The validity of this last mentioned Act seems doubtful and the Legislature has not attempted to re-enact it in either of the revisions or consolidations which have been made since 1867.

After the death or resignation of the present Judge in Equity, a difficulty will arise in the administration of the Divorce Court, because under R. S., N. S. 5th series, c. 104, s. 2, pp. 799, 800, the office of Judge in Equity will then be abolished.

The number of divorces granted in this province between 1st July, 1867, and 1st December 1888, was 52.

#### NEW BRUNSWICK.

By 31 Geo. III, cap. 5, an Act for regulating Marriage and Divorce, and for preventing and punishing incest, adultery and fornication, all controversies concerning marriage and divorce were to be determined by the Governor and Her Majesty's Council, and the Governor and any five or more of the Council were constituted a Court for that purpose, the Governor being President. The Governor had power to appoint a deputy in the Court. On the division of Her Majesty's Council for the Province in 1834 into two bodies, the Executive and Legislative Councils, an amendment in that Act took place, and the Court thenceforth consisted of the Governor and the Executive Council, together with any one of the Judges of the Supreme Court or the Master of the Rolls.

By 23 Vic., N. B., cap. 37 (1860), all jurisdiction vested in the Court of Governor in Council in respect of suits, controversies and questions concerning marriage and contracts of marriage, and divorce, as well from the bond of matrimony, as divorce and separation from bed and board, and alimony, were vested in a Court of Record called "The Court of Divorce and Matrimonial Causes," and one of the Judges of the Supreme Court was commissioned under the Great Seal of the Province, Judge of the

Court. The grounds of divorce *à vinculo* are limited to impotence, adultery, and consanguinity within the degrees prohibited by 32 Henry VIII, cap. 38, and there is express provision that the divorce *à vinculo* on the ground of adultery shall not in any way affect the legitimacy of the issue.

A difficulty has arisen from the Act constituting this Court making no provision for the substitution or appointment of another judge to act *pro hac vice* in case of the illness or absence of the judge so appointed by commission, or by his being prevented from other causes from presiding. An unsuccessful attempt was made in the Dominion Parliament in 1870 to pass an Act to remedy this, but the mere mention of a divorce court raised such a storm that the Government withdrew the bill and has not since proposed legislation of any description in connection with divorce.

The Province, assuming no doubt to act within the spirit of sec. 92, sub-sec. 14 of the B. N. A. Act, 1867, by which the Provincial Legislature is authorized to make laws in relation to "the administration of justice in the province, including the constitution, maintenance and organization of the provincial courts, both of Civil and Criminal jurisdiction, and including procedure in Civil matters in those courts," has passed, in 1868, some legislation in connection with procedure in the Provincial Divorce Court, and in 1877 were consolidated the laws on this subject excepting such as make provision respecting the causes for divorce, these being published for information only. The present Judge of the Court has been commissioned by the Federal authorities since this consolidation.

The number of divorces granted in this Province from 1867 to 1888, inclusive, was 40.

#### PRINCE EDWARD ISLAND.

By 5 Wm., IV., (1836), cap. 10, all matters touching marriage and divorce, including separation from bed and board, and alimony, are directed to be heard by the Lieut.-Governor and his Council, and the Lieut. Governor and any five or more of the Council are thereby constituted a Court with the Lieut.-Governor as president. Authority is given the Governor to depute the Chief Justice of the Supreme Court to preside in his place.



The causes of divorce from the bond of matrimony are, frigidity or impotence, adultery, and consanguinity within the degrees prohibited by Act 32, Henry VIII., cap. 38, touching marriages and pre-contracts.

By 29 Vic., P. E. I., (1866), cap. 11, provision was made that the Sheriffs of the several counties execute the process of the Court of Divorce, and the common gaol of Queen's County was declared to be the prison of the Court. There is no provision for appeal from any decision of the Court.

No case has arisen under the Act since the Island entered the Federal Union. It is apprehended that if a case does arise there may be some difficulty in deciding whether the powers given by the Act are exerciseable by the Governor-General and Council under 12th section of the B. N. A. Act, 1867, or by the Lieut.-Governor and Council under section 129 of the same Act.

### BRITISH COLUMBIA.

The Province of British Columbia stands in a different position to that of any of the other provinces, continuing to exercise the power of granting divorces since admission to the Federal Union.

After the union of the two colonies of Vancouver Island and the Mainland of British Columbia an Ordinance (a), dated 6th March, 1867, and passed by the Legislature of British Columbia, enacted that the civil and criminal laws of England, as the same existed on the 19th November, 1858, and so far as the same from local circumstances were not inapplicable, were and should be in force in all parts of British Columbia, save so far as modified by legislation on the subject between 1858 and 1867.

Under this Ordinance, jurisdiction to exercise all the relief and powers given under the English Divorce Act, 20 and 21 Vic., cap. 85, (1857), has been assumed by the Supreme Court of British Columbia, but grave doubts have from time to time been expressed as to its right to do so.

The subject was argued in 1877 in the case of *S. vs. S.* (b), which was a suit for nullity of marriage, and exhaustive judgments were rendered, the majority of the judges of the court holding, that

(a) English Law Ordinance No. 70.  
sec. 2.

(b) B. C. Law Reports Vol. I., p. 25.

the Supreme Court of British Columbia has, in British Columbia, all the jurisdiction conferred on the Court for Divorce and Matrimonial Causes in England. The Chief Justice (Sir Matthew Begbie) dissented, and said that he thought parts of the Act were inapplicable to British Columbia, and were never intended to be applicable. He found that when the English Act came into existence, all matters relating to matrimonial causes were to be dealt with under that Act by a court composed, not of judges appointed thereto by the Crown, but of *ex officio* personages selected, not by the Crown, but by the Act itself, from five other distinct Courts, and that a suit for nullity could only be heard before three of these judges. He was of opinion that that was a Court of entirely distinct formation from the then Court of British Columbia, presided over by a single judge appointed directly by the Crown, and if the Legislature of British Columbia had even in 1859 or 1869 expressly conferred jurisdiction in matrimonial causes under that Act upon the Court here, that grant of jurisdiction would not have extended to confer power to hear petitions of nullity, which by the Act itself were to be heard before three judges. He thought that the Court now has no more than the jurisdiction which was conferred on it in 1869, and that the subsequent incidental alteration by the Federal Government of the number of judges to three, could not augment the heads of jurisdiction so as to include questions of divorce. He was therefore of opinion that the court had no authority to hear the petition for nullity or to make any order thereon.

Judge Gray, on the other hand, was of opinion that the legislative adoption by British Columbia, in March, 1867, of the English law as it existed in England on 19th November, 1858, did not necessitate the adoption of the machinery by which the English law was carried out in England, but, coupled with the language constituting the Supreme Court in British Columbia, was a direct legislative sanction and authority to carry out that law in the province by local tribunals and local machinery, and clothed the Supreme Court of the province with ample power to hear and determine divorce and matrimonial causes.

Thus the matter stands with some fifteen cases, as we are informed, in which marriage has been dissolved by decree of the

British Columbia Court. A discussion of the constitutional question involved in the decision above referred to would occupy more space than could be given, besides being outside of the writer's design, but so important a matter ought not to remain dependent upon a divided decision of a Court of first instance.

### ONTARIO.

At the time Upper Canada, now Ontario, adopted the English law relative to property and civil rights, in 1792, no power to dissolve marriage was vested in the Courts in England, and the Provincial Legislature never conferred it. The Provincial Courts of Law and Equity, however, have jurisdiction to deal with the validity of a marriage contract on the ground of its being a civil contract, and in cases of fraud, mistake, duress, and lunacy, and possibly want of age, it may be declared void (*c*).

The principle upon which the Courts act is thus laid down by Butt, J. in *Scott v. Sebright* (*d*).

"The Courts of Law have always refused to recognize as  
 "binding, contracts to which the consent of either party has been  
 "obtained by fraud or duress, and the validity of a contract of  
 "marriage must be tested and determined in precisely the same  
 "manner as that of any other contract. True it is that in con-  
 "tracts of marriage there is an interest involved above and  
 "beyond that of the immediate parties. Public policy requires  
 "that marriages should not be lightly set aside, and there is in  
 "some cases the strongest temptation to the parties, more imme-  
 "diately interested to act in collusion in obtaining a dissolution  
 "of the marriage tie. These reasons necessitate great care and  
 "circumspection on the part of the tribunal, but they in no wise  
 "alter the principle or the grounds on which this, like any other  
 "contract may be voided."

The same principle was acted on in *Harrod v. Harrod* (*e*), where it arose as an incident of the suit. So in an unreported case before Mr. Justice Proudfoot, the Trustees of a trust fund applied to the Court to be informed as to the validity of a marriage.

(*c*) *Bishop on Marriage and Divorce* (1881) Vol 2, p. 291, and cases cited. (d) 12 P. D. p. 23.  
 (e) 1 K. & J., p. 4.

In *Beatty vs. Butler*, tried at the Ottawa Assizes on 16th November, 1886, also before Mr. Justice Proudfoot, the plaintiff, an infant under the age of 21 years, by her father and next friend, brought an action against defendant to declare her marriage null and void. It was proved that while she was not of sane mind and was incompetent to give her consent to, or enter into any contract, the defendant obtained a license and took her to a clergyman and married her. Judgment was given declaring the marriage and solemnization of the ceremony null and void (*f*).

A man's intoxication or drunkenness on the occasion of the marriage ceremony, is also a ground to render void a marriage otherwise valid, but it must be shown that there was such a state of intoxication as to deprive him of all sense and volition and to render him incapable of knowing what he was about (*g*).

Since the passing of the Judicature Act, Rev. Stat. of Ont., 1888, cap. 44, sec. 52, sub. sec. 5, conferring upon the Court the power to make merely Declaratory judgments or orders, there can be now no doubt of the jurisdiction of the Court to give relief at the instance of one of the parties against the other. Where there is no capacity to contract from whatever cause, the right of the Court to declare will arise in every appropriate case (*h*).

The marriage of a minor above the age of fourteen and under twenty-one at the time of marriage, has been held to be valid in Ontario (*i*), but the correctness of this decision has been frequently questioned (*j*).

(*f*) In *Wightman v. Wightman*, 4 John, Ch. R., 343, Chancellor Kent made a decree declaring a marriage void, on the ground that the complainant was a lunatic at the time the marriage was celebrated. He held that the Court of Chancery, possessing exclusive jurisdiction over cases of lunacy, is the proper, and indeed since there are no Ecclesiastical Courts having cognizance of such causes, the only tribunal to afford relief in such a case and sustain a suit instituted to pronounce the nullity of the marriage. See also *Teft v. Teft*, 35 Indiana, p. 49., *Perry v. Perry*, 2 Paige, 501, and Kent's Com., p. 76.

(*g*) *Roblin v. Roblin* 28 Chy, 439.

(*h*) This provision was first introduced in Ontario by 48 Vic., (Ont.,

1885), Cap. 13, Sec. 5, from the English Act Previous to the English Chancery Procedure Act of 1852, (15 & 16 Vic., Cap. 86, Sec. 50), it was held that the effect of the Statute was merely to remove the objection that previously existed, where a plaintiff who might have asked for consequential relief, prayed merely, for a declaration of his right. "The words of the present rule are wider than those of the Statute, in as much as, they enable the Court to make a declaration of right whether any consequential relief is or could be claimed or not." *Wilson's Judicature Act*, 1886, p. 302.

(*i*) *Regina v. Roblin*, 21 U. C. Q. B. Repts., p. 353.

(*j*) Senate Debates, 1887, p. 384, Senator Gowan.

The marriage of a man with his deceased wife's sister was not *ipso facto* void by the English law which was adopted in 1792 as the law of Upper Canada by the Act 32 Geo. III, ch. 1., but it was illegal in the sense of being a violation of the Canonical rules by which such a union was regarded as within the prohibited levitical degrees. Such a marriage was deemed valid for all civil purposes unless a sentence of nullity was obtained from the Ecclesiastical Courts during the lifetime of the parties. This remained the law here until the Dominion Act, 45 Vic. ch. 42, was passed in 1882, which removed all disabilities (*k*).

With respect to the other cases of marriage within the prohibited degrees of consanguinity or affinity, an English Stat. 5 and 6 Will. IV. (1835) c. 54 declares all such marriages *ipso facto* void, but Vice Chancellor Esten seemed to think the Act did not extend to Upper Canada. "My reasons are that the Colonies  
"are not mentioned in the Act; not included by any necessary  
"or even strong intendment; that the Act is one of convenience  
"and policy; that the law of England was not introduced into  
"this Province by the Imperial Legislature but adopted by our  
"own; that we have a Local Legislature competent to deal  
"adequately with such matters; that the inconvenience intended  
"to be remedied by the Act 5 and 6 W. IV., ch. 54, is practically  
"unfelt here; that such marriages are recognized as valid by many  
"foreign systems, and that their being in violation of God's law,  
"is, to say the least, extremely doubtful, although so declared by  
"the statute law of England, and for other reasons" (*l*).

Should any case arise in which it is necessary or desirable that a *void* marriage should be judicially declared void, it is apprehended that relief may be afforded under the provisions of the Act, Rev. Stat., of Ont., 1888, cap. 44, sec. 52, sub-sec. 5, by which the Court is authorized to make declaratory judgments or orders (*m*).

Under the Rev. Stat., of Ont., 1888, cap. 44, sec. 29, the Court has also jurisdiction to decree alimony to any wife who would be entitled to alimony by the law of England, or to any

(*k*) *Re Murray Canal*, 6 Ont. Repts., p. 685.

(*l*) *Hodgins v. McNeill*, 9 Chy, p. 305.

(*m*) The author has an action now pending in the High Court of Justice, in which the plaintiff seeks, under this section of the Statute a judgment declaring a bigamous marriage to be null and void.

wife who would be entitled by the law of England to a divorce and to alimony as incident thereto, or to any wife whose husband lives separate from her without any sufficient cause, and under circumstances which would entitle her by the law of England to a decree for restitution of conjugal rights in an action for alimony. (*n*) By the next section (30) an order or judgment for alimony may be registered in any Registry Office in Ontario, and thus bind lands.

### MANITOBA.

Since the erection of the Province in 1870, various Acts of the Provincial Legislature and Dominion Parliament have introduced into the Province the laws of England, as they stood on the 15th July, 1870, in so far as they could be made applicable to the position of matters in Manitoba, and in so far as they have not been, or may hereafter be, repealed, altered or affected, by any Act of the Parliament of the United Kingdom or of the Parliament of Canada (*o*).

This Province having been formed since the passing of the B. N. A. Act 1867, no provincial legislation exists, as in the older Provinces of Nova Scotia and New Brunswick, to interfere with (until repealed by Parliament) the provisions of the B. N. A. Act in respect to the subjects of Marriage and Divorce.

The Court of Queen's Bench of Manitoba, exercises the jurisdiction and powers of the English Court of Chancery, and as above pointed out in the case of the High Court of Justice in Ontario, it has jurisdiction to deal with the validity of the marriage contract in cases of fraud, duress, and lunacy (*p*).

(*n*) As to the effect of a divorce obtained in the United States of America by a plaintiff whose *bona fide* domicile was in Canada, see *Magurn v. Magurn*, 3 O. R. 570, and 11 Ont. A. R. 178.

(*o*) Consol. Stat. of Man., Cap. 31 ; 48 Vic. (Man.) Cap. 15 ; 51 Vic. (Dom.) Cap. 33. In a case, *Manitoba Mortgage Co. v. Bank of Montreal*, now standing for argument in the Supreme Court of Canada, the Court

will have to decide what English laws are in force in Manitoba by virtue of the Ordinances of the old Council of Assiniboia.

(*p*) Up to the present time the Court does not appear to have been called upon to annul a marriage on any of the above grounds, and in only one case has alimony been granted viz. *Wood v. Wood*, 1 Man. Repts., p. 317.

## NORTH WEST TERRITORIES.

The foregoing remarks respecting the introduction of the English law into the Province of Manitoba, and the jurisdiction of the Court to deal with the validity of the marriage contract on the ground of its being a civil contract, are, to a great extent applicable to the North West Territories and the Supreme Court of the Territories (q).

## QUEBEC.

From local reasons arising out of the old French laws and the preponderance of those professing the Roman Catholic religion, no court has been vested with the power of dissolving marriage *à vinculo*,

By Article 185 of the Civil Code of Lower Canada, marriage is declared indissoluble.

The Provincial Courts however, have jurisdiction to annul a marriage for "Impotency, natural or accidental, existing at the "time of the marriage; but only if such impotency be "apparent and manifest. This nullity cannot be invoked by "any one but the party who has contracted marriage with the "impotent person, nor, at any time after three years from "the marriage." (r).

A marriage may also be annulled by the Court for any of the following causes: where there has been no free consent, or an absence of consent, of both parties or of one of them; error; absence of consent of parent &c., to the marriage of a minor, (s) and, lastly, where the marriage is between persons related within certain prohibited degrees.

It has been held also that where the contracting parties belong to the Roman Catholic Church, a marriage ceremony performed by a Protestant clergyman is invalid, and the marriage may be declared void. (t).

(q) Revised Stat. of Can., 1886, Cap., 50, Sec., 41 and 48.

(r) *Dorion v. Laurent* 17 L. C. Jur. 324; *Lussier v. Archambault*, 11 L. C. Jur. 53; *Langevin v. Barrette*, 4 Rev. Leg. 160.

(s) In this Province a man cannot contract marriage before the age of fourteen years, nor a woman be-

fore the age of twelve years, and children under 21 years of age must obtain the consent of their father or mother before contracting marriage.—Civil Code L. C. Art. 115, 119.

(t) *Morin v. Corporation des Pilotes* 8 Que. Law Rep., p. 222., *Laramée v. Evans* 25 L. C. Jur. p. 261.

Provision is also made by the Civil Code for separation of the husband and wife for specific causes. A husband may demand the separation on the ground of his wife's adultery. A wife may demand the separation on the ground of her husband's adultery, if he keep his concubine in their common habitation. Husband and wife may respectively demand this separation on the ground of outrage, illusage or grievous insult committed by one toward the other. The grievous nature and sufficiency of such outrage, illusage and insult, are not defined, but would appear to be left to the discretion of the Court, which, in appreciating them, must take into consideration the rank, conditions, and other circumstances of the parties. The refusal of a husband to receive his wife and furnish her with the necessaries of life, according to his rank, means and condition, is another cause for which she may demand the separation.



## CHAPTER V.

### PARLIAMENTARY DIVORCE IN CANADA.

IN a former chapter it was shown that prior to the passing of the Divorce Act in 1857, there were in England two species of divorce; the one Judicial and the other Parliamentary. Of these, the former was limited to tribunals of Ecclesiastical jurisdiction, while the latter, as its name imports, could only be obtained from the legislature.

#### **Jurisdiction of Former Ecclesiastical Courts. —**

Judicial divorce was granted either on the ground of legal impediments, or on the ground of conjugal transgression. Legal impediments, obstructing the constitution of the matrimonial "contract," were of two kinds, the one, Canonial, the other, Civil. The first included consanguinity or affinity within the prohibited degrees, and those bodily imperfections or infirmities which amount to a total incapacity for consummation. The second included a prior existing marriage, lunacy or mental incapacity, and a breach of Statutory requirements in the solemnization of marriage. The former rendered marriages which had been contracted between the parties subject to such disabilities, voidable only; the latter rendered the contract null and void altogether. The marriage was invalid *ab initio*, and the Court Spiritual pronounced what (with questionable propriety) was termed a sentence of divorce *à vinculo matrimonii*.

Conjugal transgression on the other hand, assumes the legal constitution of the "contract." Thus adultery, cruelty, unnatural practices and all the other descriptions of matrimonial delinquency necessarily presuppose a marriage of original validity. In such a case the Court Spiritual had no power to dissolve the marriage, but administered redress by the mild sentence of a divorce *à mensâ et thoro*: a sentence involving a mere separation, which

might cease at the joint volition of the parties, whose reconciliation was in fact contemplated by the Court. In the case of adultery, the sentence of the Court was followed usually by an application to the Legislature for a Parliamentary Divorce.

**Canonical Disabilities.**—The Canonical disabilities of consanguinity, &c., (*a*) rendered the marriage voidable by a judicial sentence, but they were esteemed valid for all civil purposes, unless sentence of nullity was actually declared during the lifetime of the parties.

**Civil Disabilities.**—The Civil disabilities, as they are termed, such as insanity (*b*) and idiocy, &c., make the contract void *ab initio*, on the ground of the incompetency of the parties to contract matrimony. They do not dissolve a contract already made, or put asunder those who are joined together, but they previously hinder the junction, and if any persons under these legal incapacities come together, it is a meretricious and not a matrimonial union. In such cases the sentence of the Ecclesiastical Court did not dissolve the marriage, inasmuch as no lawful marriage could have taken place; it merely declared the fact of marriage to be a nullity. Yet, in consequence of the favorable presumption, when a fact of marriage is proved, that all legal requisites for the establishment of that fact have been complied with, even such a marriage is *prima facie* to be taken as valid until the contrary be shown.

The chief importance of the distinction between void and voidable marriages, was the legitimacy or illegitimacy of the issue; unless a voidable marriage was declared void in the lifetime of both parties to it, the issue were legitimate. Still it may be of great importance to have a declaratory sentence of a competent court in order fully and unequivocally to ascertain the *status* of all concerned, whether the parties to the fact of the marriage, the issue, or those who might inherit or succeed to property in case of illegitimacy of issue. (*c*)

**Decrees by Court of Chancery.** — In former times, the

(*a*) The vexed question of marriage between a man and his deceased wife's sister, both as to past and future marriages, was settled in Canada by the passing of 45 Vic., 1882, cap. 42, D., removing all restrictions.

(*b*) The marriage of a lunatic during a lucid interval is good. *Ham-mick's Marriage Law of England*, 1887, p. 45.

(*c*) Swabey on Divorce, p. 25. See *Ante*, pages 40-1.

validity of marriage was occasionally determined by the Temporal Courts, not as an original, but as an incidental question, for example, when claim to an inheritance was set up under the title of the lawful son of a certain marriage. In *Poynter on Divorce*, p. 167, mention is made of a suit instituted under the sanction of the Court of Chancery to try the validity of the marriage of a lunatic. The evidence failing to show insanity at the time of marriage, the judge made a decree declaring the marriage valid.

**Parliament may Entertain Applications Recognized by Former Ecclesiastical Courts.**—As neither the B. N. A. Act, 1867, nor the Rules of Procedure of the Senate, define or limit the meaning of the word “divorce,” the author assumes that not only will the Parliament of Canada pass bills to dissolve marriage for the grave crime of adultery, but that it may by its grace and indulgence, and in the exercise of its unrestricted powers, also entertain applications upon grounds which were recognized by the former Ecclesiastical Courts of England, as affording claim to relief. In considering any such applications, Parliament will, no doubt, look to the powers of Provincial Courts of Law to deal with them, and relief will only probably be granted where such Courts are unable to declare an effective nullity.

**Four Parliamentary Instances.**—We have already four instances in that direction, viz : three applications for declarations of nullity, and one for a judicial separation, or a divorce *à mensâ et thoro*, founded upon the cruelty of the husband.

In the Stevenson case in 1869, an application was made to annul the marriage upon the ground that when the petitioner was only seventeen years of age, he was inveigled into marriage. (d) The marriage was not consummated, the parties separating immediately after the ceremony. The woman married again, and although she was censurable for drawing petitioner, a mere boy, into the marriage, the preamble of the bill, improperly as the author submits, charged her with adultery. The facts themselves should have been sufficient to secure petitioner his relief without thus publicly branding her as an adulteress, but the case received scant discussion in the Senate, and the House was

(d) *Regina v. Roblin*, 21 U. C., Q. B., R. 352.

doubtless influenced by the consideration that no bill to dissolve a marriage had ever passed the House of Lords without adultery being charged.

In the Lavell case, 1887, the marriage was vitiated and rendered null in law by the falsification through the fraud of both parties, of the names in the license and marriage registers. The petitioner alleged that the marriage was performed as a joke, and there had been no consummation by cohabitation. The woman married a third party. The notice of application and the petition prayed for relief on the facts or in the alternative for a bill of divorce on the ground of the adultery of the woman. By this time, whether from a better understanding of the principle that the discretion of Parliament is unfettered by precedents, and open to a free consideration of the special circumstances of every new case, or from a fuller appreciation of the enlightened spirit of the times in according to women full measure or equality and justice, the old rule of the House of Lords requiring adultery to be charged was abandoned, and the bill was passed, not charging adultery, but in accordance with the ascertained facts.

The last instance of an application for a declaration of nullity of marriage was in the White case, 1888, on the ground of the alleged malformation or incapacity to consummate on the part of the husband. In this case the application was dismissed, the evidence being insufficient to support the preamble of the bill, but it stands as an example of the principle put forward by the author that Parliament is disposed to grant relief upon grounds which were recognized in the former Ecclesiastical Courts of England as sufficient to declare a marriage null and void.

In the Province of Quebec the Courts have long been able to grant a *separation de corps*, the equivalent of a divorce *à mensâ et thoro*, as granted by the former Ecclesiastical Courts of England, and of judicial separation under the English Divorce Act, and it is only reasonable to assume that relief of a similar character will be granted by Parliament in those Provinces of the Dominion in which the Courts are not clothed with the like power. (e)

(e) It is quite competent for Parliament to entertain an application coming from Ontario for a separation from bed and board, as well as an application for a dissolution of the

marriage tie; the one sort of divorce is as much within the scope of the Union as the other. Senator Miller, Senate Debates, 1879, p. 117.

We have one instance from Ontario, that of the *Campbell* case, (f) one of the most peculiar in the history of divorce in Canada. In 1876, Robert Campbell petitioned for a bill of divorce from his wife on the alleged ground of her adultery. This was met by a counter petition from Mrs. Campbell charging him with cruelty and desertion. The Senate rejected Campbell's petition as not proved, and Mrs. Campbell obtained a bill equivalent to a judicial separation under a decree pronounced by the English Divorce Court, with a substantial annual cash allowance for the maintenance of herself and children. Provision was also made in the Act for enforcing the payment of the allowance. The right of Parliament to grant her maintenance and the custody of the children was warmly contested in both Houses upon the ground that these being civil rights they could only be dealt with by the Provincial Legislature under the terms of the B. N. A. Act, 1867, but the result of the decision of the majorities in the two Houses determined that they were incidents to marriage and divorce, and as such within the competency of Parliament (g).

**Adultery probably sole Ground for Dissolution of Marriage.**—With the above exceptions, there is no instance in which the remedy of divorce has been awarded or sought of Parliament without a charge of adultery. In the United States marriages are dissolved upon proof of charges of cruelty, desertion, drunkenness, incompatibility of temper, and other kindred offences of a personal nature, without proof of adultery. Happily no application has ever been made to our Parliament for relief upon any of these grounds, none of which go to destroy that *unity* contemplated by the bond of marriage, and which is forever lost upon the commission of the crime of adultery (h). It is believed that the moral sentiment of the people will not sanction divorce *à vinculo matrimonii* for any other cause than *adultery*, and there is abundant evidence that the great majority of the people believe that the law of God only sanctions the dissolution of the marriage

(f) Senate Journals, 1876, 1877, 1878, 1879.

(g) With respect to the maintenance or alimony, Wilson, C. J., held a contrary view; *McDougall v. Campbell*, 41, U. R. 352, but see Senator

Miller's remarks in the author's synopsis of the Campbell case *infra*, and Senate Debates, 1879, pp. 293-4.

(h) See Chapter III. on Marriage. *ante*, p. 30.

tie in cases where that crime has been committed. But it will be remembered, as has been said at the beginning of this chapter, the remedy of divorce may also be obtained in cases in which the marriage itself is void *ab initio*, as in the case of impotency or malformation preventing that consummation necessary to constitute a valid marriage. Relief under such circumstances may be more properly termed "a declaration of nullity of marriage," there being, in the eyes of the law no valid marriage.

The records of Parliament show that thirteen divorces *à vinculo matrimonii* have been granted at the instance of the husband, and twelve at the instance of the wife for the adultery of the other party.

In the Tudor-Hart case (1888) the important point was established, that proof of adultery by a married man, after separation from his wife, coupled with other circumstances, is a good ground for divorce, unless the conduct of the wife is such as to render her unworthy of relief (*i*).

The next chapter will treat of the respective rights of the husband and wife to relief for the adultery of the other.

(*i*) Senator Abbott, Senate Debates, 1888, p. 668.

## CHAPTER VI.

### THE EQUAL RIGHT OF HUSBAND AND WIFE TO DIVORCE.

ADULTERY in Protestant countries is, generally, deemed a sufficient reason for rescinding the union, because it is an offence which destroys altogether the primary objects of the married state, by introducing a confusion of offspring, and a diversion of the affections and feelings into strange channels, which reason and religion forbid them to flow in.

In England and in Canada the husband, upon due proof to Parliament of his wife's adultery, has always secured a dissolution of his marriage, unless it could be proved that he had been guilty of collusion or connivance, or unless he was open to recrimination and had been guilty of acts which would entitle the wife to be separated from him *à mensâ et thoro* by a decree of the Ecclesiastical Court.

Whether divorces *à vinculo* should be granted at the suit of the wife with the same facilities as at the suit of the husband was for a long time a question which elicited much difference of opinion in England. There are only five instances in which wives have succeeded in procuring divorces *à vinculo* from that Parliament ; but in these the husbands were guilty of other offences besides adultery, which were held either to preclude or absolve the complainants from further co-habitation. In two the adultery was incestuous, in the third there was profligacy, deceit, abandonment, and the grossest injury done to the woman which villany could inflict, and in the fourth and fifth there was bigamy. With these exceptions, there was, until a very recent period, no example of a divorce *à vinculo* being granted by the British Parliament at the suit of the woman. The applications which were made by her on the ground of her husband's adultery, and that alone, always failed.

The wife's claim to relief was objected to on the ground that the injury she sustains from her husband's adultery is comparatively trivial, or not irreparable. The argument used was, that a wife may and ought to forgive a guilty husband ; but that a husband *cannot* forgive a guilty wife. This practically created in favor of the male sex a monopoly of justice and redress. Looking at it from a social, rather than from a moral standpoint, it is true that the wife's infidelity is followed by results of a graver character than those which follow the infidelity of the husband, and that it is therefore in the interest of society that the one should be punished more promptly and more severely than the other. But it is surely illogical and unjust to say that because the infidelity of the wife deserves a heavier chastisement than that of the husband, the husband's breach of vow is in every case to be reckoned venial—that it should never be regarded as a reason for a divorce except when aggravated by other offences, distinguished by a deep dye of turpitude, such as bigamy or incest. This, however, was the view that obtained in England until a comparatively recent period.

**Wife's Position under the English Divorce Act.**—In introducing the Divorce Act of 1857 in the English House of Parliament, one of the chief contentions of the promoters was, that the proposed Act bestowed on women a power they never before had, namely: of obtaining a divorce for adultery, coupled with cruelty or desertion, for two years, instead of only for adultery coupled with the atrocious crime of bigamy or incest, as under the old practice. The bill was opposed on the broad ground that it differed in spirit from the law of other countries, and notably of Scotland, in that it placed an uneven and unjust measure on the relative culpability of male and female matrimonial offences.

**Lord Lyndhurst's Appeal to the House of Lords.**—In the House of Lords, Lord Lyndhurst thus spoke in favor of the claim of the wife to relief to an extent equal with the husband. "Let their Lordships do justice. Let them not suppose that if they allowed a woman to proceed against her husband for adultery, our courts would be filled with such applications: there was no foundation for such an assumption. Remember



“ that this proceeding could only be instituted by the woman ;  
“ and no one who knew anything of the female character could  
“ suppose that she would be easily prompted to institute a pro-  
“ ceeding of this kind. Every man who has studied the female  
“ character must know that nothing but a long, deliberate, hope-  
“ less suffering—nothing but intolerable agony, would overcome  
“ her patient endurance—would induce her to come to the court  
“ for a divorce. Everything which a woman holds dear was at  
“ stake in such a case. She loses her home, perhaps her position  
“ in society—in all probability the guardianship and care of her  
“ children—all, in short, that she most values, she forfeits if she  
“ successfully prosecutes an application of this sort ; and he said,  
“ therefore, that the more they considered, the more they would  
“ be satisfied that there was nothing to alarm them in the provi-  
“ sion he was suggesting, and that such proceedings on the part  
“ of the women would be very few in number. As he had said,  
“ their lordships ought not to legislate exceptionally on this sub-  
“ ject. In Scotland the law was equal, both as regards the man  
“ and the woman, and the woman was equally with the man  
“ entitled to prosecute for adultery. Did any inconvenience arise  
“ from that state of the law ? Had any evil resulting from it ever  
“ been pointed out ? On the contrary, all the evidence they had  
“ was decisive on the subject. They had the evidence of most  
“ distinguished individuals, who, when asked if they would wish  
“ to see a change introduced into the existing Scotch law in con-  
“ sequence of any inconvenience resulting from it, gave a positive  
“ answer in the negative, and said, ‘ We adhere to the law because  
“ we approve of the law, and find no inconvenience resulting  
“ from it.’

“ It was true that in old times the House of Lords composed  
“ of men only, not exactly administering justice, but legislating on  
“ this subject, legislated in favor of their own sex and against the  
“ other. But there had been even in that House, authorities on  
“ the side of equality. Lord Eldon was one of those to whom he  
“ would refer. He at first seemed to be opposed to granting to  
“ the woman the same measure of relief as to the man, but a great  
“ change took place in his views ; towards the close of his career,  
“ when his accumulated experience was at the highest point, Lord

“ Eldon, upon Mrs. Moffatt’s case, observed in almost the very words he was about to use, ‘ I see no reason whatever why a woman should not be entitled in a case of this kind to the same relief as a man.’ Moreover, this was not mere assertion on the part of the noble Earl; he acted upon his belief, for he moved the second reading of the Bill. Lord Brougham, too, when Lord Chancellor, opposed this motion. He (Lord Lyndhurst) knew, however, that the noble and learned Lord now felt strongly that what a man could do, a woman should also have it in her power to do, and to this view he had given clear expression in writing.”

**Effort made in House of Commons.**—In the House of Commons the provision urged by Lord Lyndhurst had the support of Lord Palmerston, Mr. Gladstone and other distinguished statesmen. Mr. Newdegate, referring to the absence of this provision “unfeignedly pronounced this to be a most cowardly Bill, for, if he was capable of interpreting the fundamental principle of the English law, it was directed to protect the weak against the strong, while this Bill refused to give the redress to the weak which it gave to the strong.”

**Protest by Minority in the House of Lords.**—It was in vain that these statesmen endeavored to save English women from the vilest oppression such as the worst days of the Spanish Inquisition never invented. The Bill being eventually carried limiting the relief to the wife to that proposed by the promoters, a strong protest was made against the inequalities of the measure as affecting men and women in a minute signed by Lords Hutchinson, Harrington, Lyndhurst and others. Among other reasons for their dissent, these noblemen urged that “no distinction is made in Scripture between the case of the man and of the woman in the commission of adultery. The sin is the same in both—both are included under the same prohibition; also that the whole tendency and spirit of the Christian religion is manifestly calculated to raise women to equal rights and equal responsibilities with men.” “It has,” in the words of an eminent writer on general law (Chief Justice Story), “elevated women to the rank and dignity of an equal, instead of being an humble companion or a devoted slave of her husband,” and accordingly

we find that as Christianity extended itself, and its influence "was brought to bear upon social and civil affairs, so the condition of woman was improved, and her rights to protection and redress acknowledged. With respect to marriage and divorce, the rule of the Roman Catholic church applies to both sexes equally, while all Protestant legislatures (except in England), in declaring that marriage may be dissolved for the cause of adultery, have accorded to the wife the same rights and remedies as to the husband." (a).

**Present unsatisfactory position of a Wife in England.**—Under the English Act, therefore, divorce at present is a perquisite of the man. The law empowers the man, however monstrous his own marital conduct may have been, to turn his wife into the street and separate her from every intercourse with her children, or leave her to starve in the work-house, if in a moment of weakness she forgets her marriage vows; but a woman who has been subjected to her husband's open and continual adultery, even under the conjugal roof, is unable to obtain divorce, only separation, unless he has been guilty of cruelty or two years' desertion as well as adultery.

The miserable concession of the English Act, an improvement on the relief accorded to women under the former Parliamentary practice—has, however, been productive of some benefit to the unfortunate wife. The English Parliament still entertains bills of Divorce from Ireland, and in the most recent cases in which relief was granted wives for the adultery and cruelty of their husbands, "a healthy change in sentiment is shown; for thirty years ago, under the practice of the House of Lords, such applications for relief would have been promptly rejected." Speaking of the Westropp Divorce Bill, Clifford says:—"According to former precedents the cruelty and adultery proved would in 1886 have been wholly ineffectual to procure a private divorce Act. But in this instance the House of Lords exercised its old jurisdiction in the spirit of the legislation of 1857"(b).

**A Better State of Things in Canada.**—A better sentiment has prevailed in Canada. Parliament, since the Federal

(a) Macqueen on Divorce 1860, p. 409-10.

(b) Private Bill Legislation, vol. 2, p. 771.

Union (1867), has passed twenty-six Divorce Bills. Twelve were in favor of women whose husbands were proved to be guilty of adultery, and of these nine were for cases in which Acts for the dissolution of the marriage could not have been obtained if the principles and precedents of the House of Lords had been entertained and acted upon by the Parliament of Canada; while in three, the Lyon, Terry and Hart cases, the evidence of cruelty was so slight, that relief was granted practically for adultery alone. Although the Lyon and Terry cases passed some years ago, it was not until in the Hart case in the session of 1888 that the principle of according to the woman justice equal to the man was fully discussed and acted upon.

**General Remarks.**—In addition to the eminent English authorities we have quoted above in favor of the wife having the same remedies as the husband in case of adultery, we obtained a brief paper on the subject which may fittingly close this chapter.

“ With those who admit the supreme authority of the scriptures, the natural enquiry is what law has the Saviour propounded on the subject? The writer believes it is that of identity of liberties, restraints and remedies to both sexes, in this matter; that the innocent wife has the same remedy as the injured husband. An able and earnest writer, John Walter Lea, thus puts it: ‘Our Lord in express words allowed the husband to ‘put away’ his unfaithful wife; he did not *expressly* allow to the injured wife any corresponding liberty. Yet we cannot deny her a similar right in similar circumstances; in such a matter as this, if any, there can ‘be neither male nor female’ in *Christ Jesus*. We say with the Encyclical (that of Pope Leo XIII., 10th February, 1880), quoting St. Jerome, ‘with us that which is unlawful for women is unlawful also for men, and the same submission on equal conditions is required.’ We say with St. Basil, *Domini dictum secundum sententiam consequentiam ex æqui et viris et mulieribus convenit quod non liceat à matrimonio discedere præterqu岸o propter fornicationem*. . . . The permission must be I think, interpreted conversely by analogy, as is the case in regard to many of the prohibited degrees; our Lord’s silence as to the converse side of the question, may be sufficiently accounted for by the

“ consideration, that as the enquiry was expressly directed to the  
“ power of the husband, to introduce the right of the wife would  
“ have been *extra questionem*. We find however that afterwards  
“ when in the house His disciples asked of the same matter,  
“ ‘ he speaks expressly of both husband and wife as bound by the  
“ same law, and therefore as so far on an equality.’ Any law, he  
“ maintains, departing from the principle which places the two  
“ parties on an equality, is defective in principle, out of harmony  
“ with the divine standard and an injury to the unity of marriage,  
“ as though the bonds which unite the husband to the wife were  
“ more strong and more difficult to break, than those which unite  
“ her to him : as if his sin were the less.”

“ Hallam, the historian, does not favor our modern *privile-*  
“ *gium*, our Acts of Parliament, to break the bond between the  
“ adultress and her husband,” but even he thinks if divorce is  
allowed in one case, it should also be allowed in the other : he  
does not see “ how we can justify the denial of redress to women  
“ in every case of adultery and desertion.”

This principle of equality was contended for and affirmed in  
the Hart case. The decision met general approval in Canada ;  
and one of the greatest, ablest and most experienced of English  
statesmen though “ not a believer in divorce ” has since said of it,  
“ the legislature of Canada has done itself honor by founding their  
“ measure on equality of responsibilities as between man and  
“ woman.”

## CHAPTER VII.

### THE JURISDICTION OF PARLIAMENT.

THE power and jurisdiction of Parliament, says Sir Edward Coke, (a) is so transcendent and absolute, that it cannot be confined, either for causes or persons within any bounds. It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal. This absolute power, which, in all Governments must reside somewhere, is entrusted by the constitution of these Kingdoms to this extraordinary tribunal. It is "the highest and greatest court over which none other can have jurisdiction in the Kingdom" (b). Parliament can, in short, do everything that is not naturally impossible.

**The Grant of Divorce altogether discretionary with Parliament.**—Under these great and extensive powers, the Imperial Parliament has from a very distant period, passed bills of divorce.

"In the enacting of such bills, Parliament has had no limit  
"to the exercise and application of its powers, to particular cases,  
"save only its own discretion.

"It is true that by Standing Orders of the House of Lords,  
"it is declared that the House will not proceed upon a petition  
"for a divorce bill, unless proof is given that proceedings had  
"been previously instituted in a court of law, and a sentence  
"obtained against the guilty party. Also that no bill of divorce  
"shall be received unless it contained a clause forbidding the  
"offending parties to intermarry. (Standing Orders of the Lords,  
"Nos. 171, 172, 183.) But it is purely in the discretion of the

(a) 4 Inst 36.

(b) Hale Parls. 49.

“ House whether or not to insist upon a compliance with these  
 “ rules ; and repeated instances can be cited wherein the House  
 “ of Lords has thought fit to dispense with them” (c).

**Same doctrine applicable to the Colonies.**— This doctrine, in settled measure, applied to all the Colonies of England, as Legislative authority was given to them, and the delegated power, has in most of the Provinces of British North America, been exercised for nearly a century, by the respective legislative bodies together with the Queen of England, represented by a Governor (d).

Speaking of the Colonies possessing constitutions, Markby, an able writer, says :—

“ The power of the British Parliament over a Colony, though  
 “ dormant, is not extinguished by the grant of such a constitution  
 “ as I have described,” (possessing legislative authority.)

“ There is amply sufficient in the Acts of Parliament which  
 “ grant colonial constitutions, to make the very acceptance of  
 “ them a mark of subordination. Nevertheless, the form of these  
 “ constitutions is not without importance ; they not only give a  
 “ greater practical independence, but they are calculated to render  
 “ the transition to complete independence easier to accomplish  
 “ should the colony think fit to ask, or the mother country to  
 “ grant it,” and in this connection he refers to the B. N. A. Act  
 1867 (e).

The functions of the governing body in India are on a different principle, being expressly limited in several directions, and action is expressly made subject to the British Parliament.

**Same Doctrine under B. N. A. Act, 1867.**—The B. N. A. Act was a delegation of legislative power in all its fullness. Canada possesses “ a constitution similar in principle to that of the United Kingdom” (f). To apply the language of the Lords of the Privy Council, “ the Parliament of Canada is supreme, and  
 “ within the limits of subjects assigned to it by the Act its power  
 “ is as plenary and ample as that of the Imperial Parliament” (g).

(c) Cushing's *Lex Parliamentaria*, p. 970, and *Lords' Journals*, passim.

(d) The late Mr. Alpheus Todd, an eminent authority on Parliamentary law, advances the like opinion in a memo. supplied by him for use in the debate on the Campbell case. *Senate Debates*, 1879, p. 287.

(e) Markby's *Elements of Law*, p. 21 and 22.

(f) B. N. A. Act, 1867, first clause of preamble.

(g) *Hodge v. The Queen*, 9 Appeal Cases, 132.

With reference to the subject of Divorce as put by the Hon. Mr. Gowan. "The general legislative powers of the Parliament of Canada under this Act to make laws for the peace, order and good government of Canada, and an unfettered exercise of this power would necessarily carry with it the authority to make laws respecting marriage and divorce, as closely identified with public safety and public morals. (By a parity of reasoning, it has been held in the United States, that the State legislatures can grant divorce unless prohibited by the constitution.) The Constitution of Canada has not left a subject (once questioned) to general expression. The power to make laws respecting marriage and divorce, has been made emphatic and express, being assigned, in terms, exclusively to the Parliament of Canada, (Sec. 91, item 26) and for some twenty years Parliament has exercised this power in passing laws for the dissolution of marriage in twenty-three cases" (*h*).

The author fully accepts the same principle as submitted by the same Honorable Gentleman in the Tudor-Hart case. "Part of the Empire, in confederation under a common Sovereign, yet with a constitution similar in principle to that of the United Kingdom, we Canadians have the making, moulding and developing of the law, the recognition or rejection of principles which shall prevail in our community, and to us it belongs exclusively to enact and declare as a Parliament in all that concerns the welfare and good government of Canada" (*i*).

The important subject of divorce then comes to us at large, broadly, in relation to the government of Canada, and is specifically placed within the exclusive jurisdiction of the Parliament of Canada as fully as naturalization of aliëns and enfranchisement of Indians, bankruptcy, procedure in criminal matters or any other of the subjects enumerated in section 91 of the B. N. A. Act.

**Within what limit should Parliament Act.**—It being clear then that the Parliament of Canada has jurisdiction to grant Statutory divorces, and that it is not limited in its power, and can grant such divorces for any cause and without any cause, the only

(*h*) Senate Debates, 1888, p. 59.

(*i*) Senate Debates, 1888. p. 628.

See also his remarks in the Lavell case, Senate Debates, 1887, p. 381.



question which can exist therefore, is within what limit ought Parliament to act?

As a matter of policy and good morals, it is universally admitted that that power should not be exercised arbitrarily and without cause.

By some it has been submitted that it is obligatory on us in Canada to follow the principles and precedents recognized in the House of Lords, but in view of the unlimited powers of our own Parliament, this argument is fallacious.

In this connection the Hon. Mr. Abbott, the Leader of the Government in the Senate, ably argued in substance as follows; "If we are to take the House of Lords as our exemplar we must at the same time adopt the principle which prevailed in that body. . . . It was progressive, and are we not to progress; are we to take the law for all time as it was laid down in England prior 1857? I think not: we must recognize the spirit of the age . . . we must administer in harmony with the principles which govern christian society . . . we must make our judgments and render our decisions or pass our laws—for that is the proper phrase to use—in harmony with the time." (*j*)

Hon. Mr. Gowan also spoke to the like effect on the same occasion: "In shaping action or legislation on a bill of divorce, upon facts in evidence before us, we naturally look to the House of Lords hoping for light, and to see what others have done in similar cases to those in which we are called upon to deliberate and act. But we have never bound ourselves to accept their decisions as authoritative and conclusive. We follow 'precedents' where they commend themselves to our judgment and we decline to follow them where they do not, and rightly so, for the decisions of the House of Lords on bills of divorce have not the weight that attaches to the regular legal tribunals. The majority determines, and in a minority on a vote may be found men of learning, wisdom and experience, expressing opinions adverse to the determination, more in accordance with the eternal principles of truth and justice" (*k*).

Moreover it should be remembered that the practice of granting Parliamentary divorces by the House of Lords was not

(*j*) Senate Debates, 1888, p. 665-6.

(*k*) Senate Debates, 1888, p. 600.

itself fixed and systematized upon a principle ; it was in a constant state of growth and development from generation to generation. The House dealt with cases according to circumstances, and when new cases came forward of sufficient gravity to induce its members to think that they ought to be included by parity of reasoning within the principles upon which they had formerly granted divorce bills, they made a fresh admission of such cases accordingly.

Others again presume that Parliament exercises its powers in this regard in consequence of there being no divorce court in Canada, and that it desires as far as possible to follow the principles which would guide such a tribunal if it existed. This is the leading principle in Westropp's case, an Irish case, in the House of Lords in 1886. It was there laid down that whatever would justify a divorce and afford a legal ground for it under the provisions of the Divorce Act of 1857, where that Act prevails, should afford sufficient ground for an application to the legislature to grant a divorce in that part of the United Kingdom where the Act does not itself operate (*l*). The Minister of Justice (*m*) evidently took the same view in his speech in the Ash case when he said that he understood the principle to be that bills of divorce would be granted in Canada upon the same evidence and under the same circumstances as applications would be granted before a judicial tribunal ; and that in as much as we follow in judicial matters so closely the English model, he presumed that the English tribunal for divorce, would be the model most favoured by our Parliament.

This view is susceptible of doubt, because although no mention is made in the English Divorce Court Act of former Parliamentary practice, as furnishing any guide to the new court, yet the court does as far as is reasonable, follow the general principles upon which the English Parliament proceeded in dissolving marriages, the Statute having set up as bars to a petition for dissolution the same offences on the part of the petitioner which Parliament regarded as disentitling to relief the party so offending (*n*).

(*l*) 11. L. R. Appeal Cases, (1886) p. 294.

(*m*) Sir J.S.D. Thompson, formerly

Judge of Supreme Court of Nova Scotia.

(*n*) Pritchard's Divorce Practice, 1874, pp. 1 & 2.

We are thus brought back to the House of Lords itself, and in treating of the principles upon which divorce is administered in Canada, it may be safely assumed that as every divorce bill is a law for the particular case, the decisions and precedents of that House will only be followed when they commend themselves to the judgment of our legislators.

The correctness of this view is substantiated by the precedents of our own Parliament. It has already been pointed out that the House of Lords never granted a woman a divorce save for the adultery of the husband coupled with misconduct of the most aggravated character, and that under the Divorce Court Act, the adultery must be accompanied by cruelty or desertion, before she is entitled to relief (o). In Canada, however, examples occur in which the wife has obtained her bill of divorce for the adultery of the husband without any of these aggravating circumstances (p).

**Divorce a Legislative Act**—A divorce is a legislative Act originating in the Senate (q), and when a man comes with a petition for a divorce bill, he comes to solicit a privilege, a preference to one individual over another(r);—an immunity from obligations which are binding on the general mass of the community; and he is bound to submit to such rules as the House in its wisdom thinks proper to lay down for the conduct of all business brought before it (s).

**Falls Under Head of Private Bill Legislation.**—The subject of divorce falls under the head of Private Bill legislation, and the practice and procedure in the prosecution of Private Bills for divorce, is specifically laid down and regulated by a set of Rules and Orders adopted by the Senate. The principle on which these Rules or Standing Orders were originally established, was for the detection of cases of collusion and the prevention of encouragement to adultery.

(o) Ante pp. 12-13.

(p) The Lyon, Terry, and Tudor-Hart cases are illustrations of this principle.

(q) But there is no reason why it should not originate in the Commons. Senate Debates 1877, p. 227, Sir Alex. Campbell.

(r) "Though we take these cases as if they were *quasi judicial*, and

between party and party, we are in a legislative capacity; we are making a law, a *privilegium*, no doubt, but a law, and we may call witnesses, though neither party do so." *Per* Lord Brougham. The Talbot case, 1857.

(s) Dr. Phillimore, *Mirror of Parliament* 1830, Vol. 9, p. 2080.

**Domicil as an Element of Jurisdiction.**—An element of much importance in determining, first—the jurisdiction of any tribunal to dissolve the marriage tie, and second—the validity of a foreign decree of divorce, is the domicil of the parties at the time of the beginning of proceedings for relief. “Domicil” means the place or country which is considered by law to be a person’s permanent home (*t*), and is distinguished from “residence,” which has been defined as “habitual physical presence in a place or country,” the presence there being for the greater part of the time, be it long or short, which the person using the term residence contemplates (*u*).

Upon three occasions only, has the subject of domicil been under consideration by our Parliament. In the Harris case, (*v*) both parties having previous to the application removed their domicil from Canada, the Bill was rejected. In the Birrell case, (*w*) two persons were married and domiciled in Canada; the husband through gross fraud and misrepresentation obtained from a Court in the State of Michigan a decree of divorce from his wife for her alleged desertion, and he then married again. His wife by the first marriage sought and obtained from Parliament, a divorce on the ground of his adultery. The American divorce was put in evidence and held bad. These two cases were dealt with upon principles not inconsistent with the law of domicil applicable to such cases, and as observed in the English Divorce Court, and which will be noticed presently.

**Ash Case.**—In the Ash case (*x*) the validity of another American divorce decree was the subject of considerable discussion in Parliament. In the Senate the rule in the law of domicil was held to be inapplicable to any proceeding before Parliament; while in the Commons, the case was there determined on the insufficiency of proof of the husband’s domicil in the United States. The facts are fully set out on page 26 of this work. This American decree having been in evidence before the Committee of the Senate, the question before that House was, whether it operated as a valid divorce or not: whether Parliament should not as a matter of international

(*t*) Dicey on Domicil, 1879, p. 1.

(*u*) Ibid p. 76.

(*v*) Ante, p. 18.

(*w*) Ante, p. 26.

(*x*) Ibid.

courtesy and the comity between nations, recognize such a decree of divorce as valid in Canada—that it should be regarded as *prima facie*, a correct judgment. This view was pressed on the Senate by the Chairman of the Committee, Senator Dickey (*y*), and others. After arguments by Senators Gowan (*z*) and Scott (*a*) to the effect that the action of Parliament could not be restrained or controlled by the action or proceedings of any foreign court of law, or be bound by the rules recognized and acted on respecting them in the Provincial courts, Hon. Mr. Abbott, the leader of the Senate, addressed the House, and pointed out a distinction in the argument of Mr. Dickey, when made before a Court of Justice and when addressed to Parliament. He thought that it did not apply to a case where one of the countries had not relegated the subject matter of the judgment to the Courts—where in one those countries the court has no jurisdiction over it. This was the case in Canada—the power of any court to deal with the subject of divorce had not been recognized. The following is the text of his remarks: “The proposition contended for by  
 “those who insist that this divorce is valid is, that inasmuch as  
 “there has been a judgment of a court—a competent court in the  
 “place where it was rendered—we must accept that judgment as  
 “binding upon us, as declaratory of the dissolution of this marriage, as effectually dissolving this marriage. Now there is a  
 “great distinction to be taken between an argument of that kind  
 “addressed to a court of justice, and an argument of that kind  
 “addressed to a tribunal like this. This House is, in this instance, acting not only in a *quasi*-judicial capacity, but it is  
 “acting in a legislative capacity as well, and in determining to  
 “pass this Bill this House will decide in its legislative capacity  
 “that this marriage is dissolved. The effect of a judgment of a  
 “court in one country upon the judgment of a court in another,  
 “depends upon the comity between nations, and on this principle,  
 “that as both nations, being Christian and civilized nations, have  
 “determined to treat the subject matter of a judgment as a fit  
 “matter for discussion, inquiry and decision by their courts, then,  
 “out of, as it were, international courtesy, they treat the judgment

(*y*) Senate Debates 1887, p. 170-2.

(*a*) Ibid p. 172 and p. 211.

(*z*) Ibid, p. 165, 174 and p. 213.

“ of a court of another country upon that subject—the jurisdiction  
 “ over which is common to the courts of both countries—as  
 “ entitled to consideration and weight ; and they give it by cour-  
 “ tesy that consideration and weight involved in regarding it as  
 “ *prima facie* a correct judgment. That proposition, however,  
 “ does not seem to me to apply to a case where one of those  
 “ countries has not relegated the subject matter of the judgment  
 “ to the courts—where, in one of those countries, the courts have  
 “ no jurisdiction over it. Where, therefore, the subject of the  
 “ judgment is not a matter, the jurisdiction over which is common  
 “ to the courts of both countries ; the courts of one country are  
 “ not called upon by any rule of courtesy such as that arising from  
 “ the similarity of jurisdiction, to recognize the validity of the  
 “ judgment of its neighbor. We stand in that position. We have  
 “ not yet recognized the power of any court to deal with the ques-  
 “ tion of divorce. We hold it to be a matter beyond the juris-  
 “ diction of the courts, while, on the contrary, on the other side  
 “ of the line, the matter of divorce is so much within the juris-  
 “ diction of the courts that, as His Honor the Speaker has shown,  
 “ there is scarcely any ground of difference between a man and  
 “ woman living together as husband and wife, which has not been  
 “ held sufficient to justify the dissolution of marriage. I agree,  
 “ therefore, with the hon. gentleman from Ottawa, that there is  
 “ nothing binding in the argument which claims for a judgment  
 “ by a foreign court that kind of consideration and recognition in  
 “ this House which that judgment would have before an ordinary  
 “ tribunal upon a matter, the subject matter of which was common  
 “ to both.” Touching the question of the validity of the Ameri-  
 can decree under the law of domicil as administered in the English  
 legal tribunals, he was of opinion, that from the absence of  
 evidence of the husband’s domicil, and the fact that the Court  
 had no jurisdiction over the wife who had continued a resident  
 of Canada, the decree was invalid here (*b*).

Others urged that if the American decree was defective in  
 any particular, it should be attacked in the court from whence it  
 issued, but this contention could scarcely be justified on account

(*b*) Ibid, p. 223, Phillimore’s Inter-  
 national Law, and *Dolphin v. Robins*,

7 H.L.C., p. 390, were cited in sup-  
 port of his views.

of its hardship upon the wife, and the expense it would have entailed, and when it is reflected that she was always a resident of Canada, and entitled by the law of domicile to a domicile separate from her husband for the purpose of maintaining an application for the dissolution of her marriage. The difficulty of rescinding the American decree would also have been an obstacle, because the United States Courts are very strong in the position that after marriage has taken place subsequent to divorce, they will not interfere.

In the House of Commons, the question as to the recognition and sufficiency of the decree of divorce turned chiefly on another point, namely the want of evidence that the husband had a domicile in the State where the decree was made, and this was certainly an objection that would hold even in a Court of Justice. The Minister of Justice, having in this connection stated that he assumed Divorces would be granted here on the same evidence and under the same circumstances as an application before a tribunal in England, which had jurisdiction over the subject, held that there was no evidence in this case, other than a recital in the decree, that the husband had a domicile or residence in Massachusetts which gave any right in law to the Court there to dissolve the marriage—that therefore, for all the purposes of these proceedings, the Court in Massachusetts had no jurisdiction, and its decree could not be recognized in Canada. He cited the case of *Harvey v. Farnie* (c) in support of his opinion.

He stated also that although it is a general principle of law that the husband's domicile is also that of his wife, the wife does not forfeit the rights she has to assert against him when he is acting in violation of his marriage duties (d). In support of this he

(c) 8 Appeal Cas. 43. The text of this decision is as follows: The English courts will recognize as valid the decision of a competent foreign Christian tribunal dissolving the marriage between a domiciled native in the country where such tribunal has jurisdiction, and an English woman, when the decree of divorce is not impeached by any species of collusion or fraud. And this, although

the marriage may have been solemnized in England, and may have been dissolved for a cause which would not have been sufficient to obtain a divorce in England. The cases of *Niboyet v. Niboyet*, 4 P. D. 1-8; and *Pitt v. Pitt*, 4 Macq., H. L., 627, were cited as in favor of this view. Commons Debates, 1887, pp. 1017-21 (d) Commons Debates, 1887, p. 1062-4.

cited from a judgment of Mr. Justice Gwynne, "that for the purpose of instituting a suit for divorce, the wife may have a domicile separate from that of her husband" (e).

Hon. Mr. Davies (f) contended that there was sufficient evidence of domicile, and that the decree was binding, but as petitioner was a resident of Canada, she had sufficient forensic domicile to justify her in asking Parliament for relief on the ground that her husband had obtained a divorce abroad (g).

The Minister of Justice and the Leader for the Government in the Senate concurred in the conclusion that the Bill should be passed. "I had not time," said Hon. Mr. Abbott, "to discuss with him the reasoning by which he arrived at these conclusions, but his are the same as mine," and then Mr. Abbott gave, as his own views, what has been given above. The Bill came back to the Senate somewhat softened in expression in the preamble, but the enacting clauses were not changed and the Bill, as amended, was accepted by the Senate.—*Senate Debates*, 1887, p. 578.

The Commons only dealt with the subject of want of jurisdiction in the Massachusetts court, which point was also considered in the Senate. The Senate certainly accepted the other important principle contended for by Mr. Abbott. As the Bill finally passed, both Houses held in effect that the foreign decree in question was no bar to Parliamentary action.

The Honorable Mr. Scott, the Leader of the Opposition, and the Honorable Mr. Gowan, expressed full acceptance of Mr. Abbott's views. The former gentleman thus strongly put the point: "Under our Constitution we say that divorce shall not be granted except by the Parliament of Canada, and is the Parliament of Canada going to relieve itself of the responsibility and burden that is thrown upon it wisely and properly by its constitution and say that the Legislature will recognize, under the comity of nations, the laws of other countries granting divorce?" He felt it his duty to enter his protest "against the principle being accepted by this House that we are in any degree bound by international law to recognize divorces granted

(e) *Stevens v. Fisk*, 8 Legal News, p. 42.

(f) Formerly Attorney-General of P.E.I.

(g) *Commons Debates*, 1887, pp. 1021-5.



“in a foreign country. It was never contemplated in our Constitution that we should do so. If it was intended that courts of law could dissolve the marriage tie, why did not the founders of the Constitution provide for the establishment of a divorce court in Canada? When such a court is established in Canada it will be time enough to recognize the principles on which a court of one country is governed by the decrees of courts of another. It is the duty of Parliament to keep well within itself the power to dissolve the marriage tie. Canada will be all the better in the years to come if we hold to that principle soundly and wisely; I trust, therefore, that the loose doctrines which are now being propagated as to foreign divorces will be no more advocated in this House. I am quite sure they are not in accord with the better spirit of the people of this country. I know that they are held in horror by nearly one-half of the people of Canada, whose opinions are entitled to respect. I know that in those churches which do reluctantly accept the principle of divorce, and notably the Episcopalian, the leading minds regard with dismay and terror the havoc that has been made in the social system in the neighboring country where the permission to annul the marriage tie is so easily obtained.”—*Senate Debates*, 1887, p. 173.

The position of Canada is analogous to that of England before the British Parliament relegated the subject of divorce to a Court and it appears to have been tolerably well established in that country at that time, that as an English marriage was indissoluble but by act of the Legislature, a foreign decree dissolving it was invalid.

The original and main foundation for this opinion is Lolley's case (*h*). A divorce *à vinculo* had been rendered in Scotland between English subjects still domiciled in England, in which country also the marriage had been celebrated; and after the husband had entered into a second marriage; he was indicted at home for polygamy, and in answer to the indictment he set up the Scotch divorce. But he was convicted. The judges held the conviction right, being unanimously of opinion, that no sentence or act of any foreign country or state could dissolve an

(*h*) *Rex v. Lolley*, Russ & Ry. 237.

English marriage *à vinculo matrimonii*, for ground on which it was not liable to be dissolved *à vinculo matrimonii* in England.

Lord Brougham who was counsel for the prisoner stated the next year before the House of Lords while arguing as counsel the case of *Tovey v. Lindsay*, 1 Dow. 117, that he had a note of Lolley's case taken by himself at the time the judgment was delivered as follows; that the judges "were unanimously of opinion upon the points reserved, that a marriage solemnized in England, was indissoluble by anything except an Act of the Legislature."

"The very practice of the Legislature in granting, by special Acts, particular divorces in particular cases, affirms the indissolubility as existing in the general law, and to be maintained by the Courts in their dispensations of justice" (i).

In *McCarthy v. De Caix*. (j) Mr. Tuite having married in England was divorced in Denmark; the wife came to England and died; the husband took out letters of administration in England to his wife, and upon his death there was a suit in Chancery between his executors and the next of kin of his wife relative to her property. Brougham, Lord Chancellor, decreed in favor of the executors, observing that the English marriage, could not be annulled by the Danish law.

The principle has been more recently enunciated by Sir W. Page Wood, (afterwards Lord Chancellor Hatherley) in *Wilkinson v. Gibson* (k).

"Formerly there could be no dissolution of marriage by any means known to the law of England; for when recourse is had to the authority of the Legislature, and the Sovereign power of the country is invoked through the medium of the Crown and both Houses of Parliament, that is an admission that there is no law existing which permits that to be done for which it is thus necessary to invoke the Sovereign authority. Whatever may be the effect spiritually, on higher grounds and considerations, there can be no doubt that the Sovereign power of every country, has authority over everything which relates to persons and property."

(i) Sir Wm. Scott in *Proctor v. Proctor*, 2 Hagg. Cons. 301.

(j) 2 Cl. & F. 568.

(k) 4 L. R. Eq., p. 168.

It is well known that in the States of the American Union, divorce is granted with the greatest facility and for comparatively trivial causes, none of which, with the exception of adultery, have ever been recognized in Canada as a valid cause for divorce. The close proximity of Canada to the United States has led many Canadians to take advantage of the facilities thus afforded by a temporary residence there to procure a release from marital bonds, and frequently upon comparatively frivolous pretexts.—Occasionally cases must come before the Provincial Courts of law in which the question of the validity of these American decrees must arise incidently, and no doubt our courts may feel compelled to observe the rule as to the comity between nations, and recognize them as valid unless impeachable on the ground of fraud etc. It was therefore a matter of great importance that when a divorce decree of this character was brought squarely before Parliament, that that body, (the custodian of the morals and well being of the community), should authoritatively declare that it should have no force or effect in Canada, and that Parliament would jealously guard and maintain its jurisdiction in divorce matters over all persons within its jurisdiction.

Upon the principle that “every State has an undoubted right to determine the *status*, or domestic and social conditions of the persons domiciled within its territory,” (*l*) Parliament will probably refuse to recognize jurisdiction in divorce matters under the law of domicil when it has been exercised by the tribunal of another country at the instance of the injured party when domiciled in a foreign country and the respondent is domiciled in Canada.

A prominent American writer (*m*) on Divorce holds the like opinion supported by authorities cited by him: “Every State “makes its laws for and has the right to control the domestic “*status* of those who make their home in it. When both parties “are domiciled in the State where their divorce is granted, there “is no difficulty, the divorce is valid everywhere. In cases where “the wife has a different domicil from her husband, her *status* as a “married person will depend on different laws from his: two

(*l*) *Strader v. Graham*, 10 How, U. S. p. 82; Bishop on Marriage and Divorce, 1881, Vol. II, p. 127.

(*m*) Stewart on *Marriage and Divorce*, 1884, p. 193, sec. 220.

“different States are interested in two different *status* arising from the same marriage. If in such case a court of the husband’s domicile dissolves the marriage on his application, not only is such divorce no bar to the wife’s application in her domicile for a divorce, but if she marries again on the strength of his divorce, her courts may deem her a bigamist, unless her State has in some way consented to the first divorce, as by analogous legislation.”

The foregoing remarks go to show clearly in the judgment of the writer, that no analogy can be drawn between the jurisdiction Parliament may exercise on the question of domicile, and the rule as to domicile that may guide and govern in the ordinary Courts of law.

With respect to the law of domicile generally, its nature and manner of ascertainment, as well as certain rules touching domicile in divorce in England, the author for the sake of convenience in reference, has abstracted the following rules from Professor Dicey’s Treatise on the *Law of Domicil*, 1879.

**Nature of Domicil.**—“RULE 1.—The domicile of any person is, in general, the place or country which is in fact his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law.

RULE 4.—A domicile once acquired is retained until it is changed, (i) in the case of an independent person by his own act; (ii) in the case of a dependent person, by the act of some one on whom he is dependent.

**Acquisition of Domicil.**—RULE 5.—Every independent person has at any given moment either (i) the domicile received by him at (or as from) his birth, which is called the domicile of origin; or, (ii) a domicile (not being the same as his domicile of origin) acquired by him while independent by his own act (which domicile) is called a domicile of choice.

RULE 7.—Every independent person can acquire a domicile of choice, by the combination of residence (*factum*) and intention of permanent or indefinite residence (*animus manendi*), but not otherwise.

**Ascertainment of Domicil.**—RULE 13.—The domicile of a

person can always be ascertained by means of either (i) a legal presumption ; or (ii) the known facts of the case.

RULE 14.—A person's presence in the country is presumptive evidence of domicil.

RULE 15.—When a person is known to have had a domicil in a given country, he is presumed, in the absence of proof of a change, to retain such domicil.

RULE 16.—Any circumstance may be proof or evidence of domicil, which is evidence either of a person's residence (*factum*), or of his intention to reside permanently (*animus manendi*), within a particular country.

RULE 17.—Expressions of intention to reside permanently in a country are evidence of such an intention, and in so far evidence of domicil.

RULE 18.—Residence in a country is *prima facie* evidence of the intention to reside there permanently (*animus manendi*) and in so far evidence of domicil.

RULE 19.—Residence in a country is not even *prima facie* evidence of domicil, when the nature of the residence is inconsistent with, or rebuts the presumption of, the existence of an intention to reside there permanently (*animus manendi*)" (n).

**Domicil in respect of Divorce.**—RULE 46.—Jurisdiction in matters of divorce depends, in general, upon the domicil of the parties to a marriage at the time of the commencement of proceedings for divorce. Hence in general,

(1).—A Divorce Court of any country where such parties are then domiciled has jurisdiction to dissolve their marriage ;

(2).—No court of any other country has jurisdiction to dissolve the marriage.

**English Divorces.**—SUB-RULE 1.—The English Divorce Court has jurisdiction to dissolve the marriage of any parties domiciled in England at the commencement of proceedings for

(n) The leading cases on domicil are *Brook v. Brook*, 9 H.L. Cas. 193; *Sottomayor v. De Barros*, 3 P. D. 1, 5; *Simonin v. Mallac*, 2 Sw. & Tr. 67; *Dalrymple v. Dalrymple*, 2 Hagg. C. 54; *Pitt v. Pitt*, 4 Macqueen, H. L. Cases, 627; *Dalhousie v. McDouall*, 7 Cl. & F. 817; *Harvie v.*

*Farnie*, L. R. 8 App. C. 43; *Dolphin v. Robins*, 7 H. L. Cases 390; *Shaw v. Attorney-General*, L. R. 2 P. & D. 156; *Niboyet v. Niboyet*, 4 P. D. 1; *Firebrace v. Firebrace*, 4 P. D. 63; *Scott v. Attorney-General*, 11 P. D. 128; *Ingham v. Sachs*, 56 L. T 920.

divorce. The jurisdiction of the court in respect of such parties is not affected by (i) the residence of the parties, or (ii) the allegiance of the parties, or (iii) the domicil of the parties at the time of the marriage, or (iv) the place of the marriage, or (v) the place where the offence, in respect of which divorce is sought was committed.

**SUB-RULE 2.**—Subject to the exceptions hereinafter mentioned, the English Divorce Court has no jurisdiction to dissolve the marriage of any parties not domiciled in England at the commencement of the proceedings for divorce (?).

**Exception 1 to Sub-Rule.**—The Divorce Court has under exceptional circumstances jurisdiction to dissolve a marriage where the parties are (or possibly where one of them is), at the commencement of proceedings for divorce, resident though not domiciled in England.

**Exception 2 to Sub-Rule.**—The Divorce Court has jurisdiction to dissolve a marriage between parties not domiciled in England at the time of the proceedings for divorce, where the defendant has appeared absolutely and not under protest.

**Exception 3 to Sub-Rule**—The Divorce Court has jurisdiction to dissolve an English marriage between British subjects on the petition of a wife who is resident, though not domiciled in England.

**Foreign Divorces**—**SUB-RULE 3.**—Subject to the exceptions hereinafter mentioned, the Divorce Court of a foreign country has jurisdiction to dissolve the marriage of any persons domiciled in such foreign country at the commencement of proceedings for divorce, and a divorce by such a court is valid.

**Exception 1 to Sub Rule.**—A foreign divorce is not valid which is obtained by the collusion or fraud of the parties.

**Exception 2 to Sub Rule.**—A foreign divorce is not valid if the proceedings are conducted in a way contrary to natural justice.

**Exception 3 to Sub Rule.**—A foreign divorce of the parties to an English marriage, for a cause for which divorce could not be obtained in England, is not valid (?).

**SUB-RULE 4.**—Subject to the possible exception hereinafter mentioned, the Divorce Court of a foreign country has no jurisdiction to dissolve the marriage of parties not domiciled in such foreign country at the commencement of proceedings for divorce, and a divorce granted by such Court to parties not then domiciled in such country is not valid.

**Possible Exception to Sub Rule.**—The Divorce Court of a country where the parties to a marriage are not domiciled has jurisdiction to dissolve their marriage, if the divorce granted by such court would be held valid by the courts of the country where the parties are domiciled.

**Effect of Divorce**—**RULE 47.**—The effects in England of a valid divorce granted by a foreign Court are the same as the effects of a divorce granted by the English Divorce Court.

## CHAPTER VIII.

### RULES, ORDERS AND FORMS OF PROCEEDINGS OF THE SENATE OF CANADA TOUCHING BILLS OF DIVORCE AND PROCEDURE THEREON.

IN the Legislative Councils of Upper and Lower Canada, the Rules of procedure were from the first based on the practice of the House of Lords, as far as the constitution of the House and the circumstances of a new country permitted; and the same course was pursued in 1841 by the Legislative Council of United Canada and again in 1867 by the Senate of Canada. (*a*).

Until 1888, the special Rules relating to Divorce, observed by the Upper House of Parliament in Canada, were with some modifications, similar to those that have for many years governed the House of Lords in England. In that year they were rescinded by the Senate and a new set was adopted.

Before proceeding to the examination of these Rules it may be observed that procedure in the past touching bills of divorce was most defective and unsatisfactory. "They were embarrassing to the practitioner, to officers and to all engaged in administration. Moreover, they did not effectually guard against imposition on the House, and doubts and difficulties were constantly cropping up." The radical defect in the mode of appointing the Committee to inquire into the facts was severely commented upon, and numerous complaints found expression within, as well as outside, the Senate Chamber. It became evident that a reform was necessary. The work of reform was undertaken by Senator Gowan (*b*), and earnestly pressed on the consideration of the Senate. His scheme was entertained, and the subject referred to a Special Committee embracing men of large parliamentary

(*a*) Bourinot's Parliamentary Practice, p. 210.

(*b*) Formerly a Judge in Ontario.

experience, and the best legal ability in the House. The subject was fully and carefully discussed in all its details by the Special Committee and afterwards by Committee of the Whole House. The body of Rules submitted was finally, with some alternations adopted by the Senate on the 11th April, 1888, the old Rules being rescinded. These new Rules and Orders placed the procedure for divorce on as sound and satisfactory a footing as was possible without special legislation of a radical character. The Rules, 23 in number, are conveniently designated by letters A to W, and will be noted in their order.

Other Rules bearing upon the Private Bill procedure generally still apply when not inconsistent with the new Rules. The present Rules might be regarded as more complete if such portions of the old Rules which bear upon divorce bills under the new practice had been embodied and thus form a code, as it were, complete in itself. But that would, of course, involve the repetition, with certain modifications, of several rules and might lead to confusion.

The new Rules seem to have in view adultery only as a ground of divorce. There is nothing in them expressly limiting to this cause, nor would it be possible in Rules and Orders to restrain the discretion of Parliament, but in framing them the Senate appears only to have had in view, this, the highest matrimonial offence.

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### RULE A. (c)

*Appointment of Committee—Meet next day—Organization—Quorum—Mode of Voting.*

At every Session of Parliament a Committee (1) of nine Senators shall be appointed by the Senate to be called "The Select Committee on Divorce," to whom shall be referred all petitions and Bills for Divorce, and all matters arising out of

(c) This Rule is original except as to the mode of appointment of a Committee at every session. The

Standing Order of the English House of Commons has been followed in this respect.



such Petitions and Bills, and no reference to any Committee other than the said Committee shall be necessary with respect to such Petitions, Bills and matters.

The Committee, (2) unless it be otherwise ordered by the Senate, shall meet on the next sitting day after their appointment and choose their Chairman (3), and five of the Senators on such Committee shall constitute a quorum.

All questions before the Committee shall be decided (4) by the majority of voices, including the voice of the Chairman, who shall have no casting vote.

The trial or hearing of the case is not before the Senate, but before a Standing Committee intrusted with the judicial functions conferred by the Rules. (d)

(1). Under the former practice of the Senate, the Senator in charge of the Bill immediately after the second reading, moved the appointment of a Select Committee of nine, and named its members. The Leader of the House, or the Speaker of the Senate, was supposed to supervise and approve of the composition of the Committee, but as a rule the Senator in charge made the selection, a system that gave rise to much dissatisfaction, as it was felt that the personal weight and influence of the Senator, who invariably named himself a member, more or less influenced the selection and affected the deliberations of the Committee.

The draft Rule as submitted by Senator Gowan, made the Committee consist of seven members. The Special Committee appointed to consider the proposed Rules accepted this, but in the House the number was increased to nine. The writer believes that the general feeling of the legal profession favors a

(d) In the English House of Lords, Irish cases are heard and all proceedings are before the House itself and not before a Committee. The presence of peers who are in the active exercise of judicial administration as

members of the Judicial Committee of the Privy Council obviates the necessity for a Committee, and these cases are invariably heard by no one but the "Law" lords.

smaller committee, the duties being of a *quasi* judicial character. The Supreme Court, the highest in the Dominion, has not a greater number of Judges, and it must be remembered that the Senate passes on every report made by the Select Committee.

Under the former practice the petition was referred to the Standing Orders Committee on Private Bills, to report whether the Rule respecting publication of notice was complied with, while the proofs of service had to be made before the House. Instead of the various stages of a Bill being divided between the House and Committees, it will be found much more convenient, as well as tend to uniformity in practice, that all petitions and bills for divorce and all matters arising out of the same be referred to one Committee. (e) Bills in the nature of Divorce and any matter of a kindred character, such as bills to nullify marriage, etc., may be referred to the Committee under this Rule.

As the value of the change indicated by this Rule largely depends upon the proper working of the Committee, the leader of the House will, no doubt, see that the Committee is composed of the best available men. A Committee composed entirely of lawyers, or a mixed one of lawyers and laymen, will also be a matter of consideration with him. Questions of fact as well as of law must necessarily arise, and as intelligent laymen have usually an aptitude for disposing of questions of fact, it is but proper that they should also constitute a portion of the Committee. A consideration of less importance also presents itself, as to whether the selection of the Committee should not be confined to the Senators of the Provinces in which no Divorce Courts exist. An almost similar principle applies in the selection by Government of professional men for appointment to the judiciary (f).

(e) The experience of Parliament has shown that in the majority of cases, requiring mature deliberation and enquiry, select Committees are the best tribunals for examining witnesses.—Bourinot's Parliamentary Practice, p. 205.

(f) The members appointed to the Select Committee on Divorce in the English House of Commons, are almost men of the highest character

and extensive legal experience. The Committee appointed 24th March, 1887, included the Attorney-General; the Lord Advocate; J. B. Balfour, Q. C., ex-Solicitor-General, Scotland; Sir John Mowbray, ex-Judge Advocate-General; Mr. Gibson, Q. C., ex-Solicitor-General, Ireland; Sir Charles Russell, Q. C.; Mr. Marum, Mr. Shaw Lefevre and Mr. Woodehouse.

Senator Gowan, in introducing the new Rules, said that under Rule 94 "Senators, though not of the Committee, may "speak before the Committee at any moment; but every one "familiar with the investigation of facts and the conduct of business knows how this may militate against the discovery of truth "in the examination of witnesses, and also against the proper and "regular conduct of an enquiry—the present rule which permits "it, is proposed to be altered, and only allow the Senators *presence* " (g). His reasons may commend themselves to those familiar with the administration of the law, but they found no favor with the Senators of the Special Committee, nor was the provision afterwards passed in the House.

Rule 94, which thus remains in force is as follows:—*Senators, though not of the Committee, are not excluded from coming in and speaking, but they must not vote; they sit behind those that are of the Committee.*

By Rule 95, *No other persons unless commanded to attend are to enter at any meeting of a Committee of the Senate.* This does not apply to members of the House of Commons who by courtesy are permitted to attend on any Committee of the Senate.

(2) As to the organization and procedure of Committee, see *Bourinot's Parliamentary Practice*, p.p. 437—445.

(3) Anybody may be appointed Chairman, but from the *quasi* judicial character of the proceedings, it will occur to everyone that a man of experience in legal procedure will be best fitted to discharge its duties.

The Chairman will have the general conduct and order of the proceedings, the direction of details to secure fair hearing, and the general administration of matters that will occur to anyone familiar with the administration of Justice. These matters are by common consent left to the direction of Chairman.

Rule B requires that he notify the Official Reporter to attend at the Sittings of the Committee.

(4) Rule 65 relating to Private Bills generally, gave the Chairman a double or casting vote, and in Senator Gowan's draft Rules was one proposing to continue the practice before the Select Committee on Divorce, but it was struck out in the Special Committee.

(g) Senate Debates 1888, p. 63.

In the absence of a Rule, every question is determined in a Select Committee in the same manner as in the House to which it belongs. In cases, in the Senate, therefore, under this Rule, when the votes are equal, the decision is to be deemed to be in the negative (*h*).

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## RULE B.

### *Notice of Sitting of Committee—Reporter—Evidence.*

Notice (1) of the day, hour and place of every sitting of the said Committee shall be given by affixing the same in the lobby of the Senate not later than the afternoon of the day before the time appointed for such sitting.

One of the Official Reporters (2) of the Senate, when notified by the Chairman, shall be in attendance at the sittings of the said Committee, and shall take down in shorthand and afterwards extend the evidence of witnesses examined before the Committee, and cause the same to be printed.

The draft rules made the Law Clerk of the Senate, Clerk of the Committee, in terms as is desirable and had always been the practice, and, in analogy to proceedings in the ordinary tribunals, required him to record the proceedings and perform such other duties as might be required of him by the Chairman, but for some reason the provision was struck out. It was possibly thought that no express provision was necessary to secure the performance of every necessary duty by the officer appointed Clerk of the Committee. The Rule now leaves the appointment of Clerk in the hands of the Committee, and it is assumed that this being probably the most important of all the Committees, the Law Clerk will be asked to act as its Clerk.

(1) Notice is only to be given in the Lobby of the Senate. It might be here implied that notice of every sitting, including

(*h*) B. N. A. Act 1867, sec. 36.

adjourned sittings from day to day, was necessary, but if both parties are present it is assumed that this will be unnecessary.

(2) When the Committee is organized the Chairman directs the attendance of one of the Official Reporters. There is no authority here for the employment of an outside stenographer, it must be one of the Official stenographers of the Senate, and his services are only required when requested.

The mode of extending the evidence is usually done by type-writing which is convenient, saves loss of time and facilitates after-reading by the witness before signing his evidence.

The Official Reporter is to cause the evidence to be printed. Being confidential work, it is obvious it should be done by the Government Printer who is under the control of the House.

The Chairman of Divorce Committees has always conceived it to be his duty to be present on the occasion of the witness signing his deposition, and himself signing the jurat. This may also be done by any other member of the Committee who has heard the evidence.

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## RULE C.

### *Printing and Distribution of Evidence.*

Evidence (1) taken before the said Committee shall be printed apart from the Minutes of Proceedings of the Senate, and only (2) in sufficient numbers for the use of Senators and Members of the House of Commons, that is to say, one copy for distribution to each Senator and Member, and twenty-five copies to be kept by the Clerk of the Senate for purposes of record and reference.

(1) The Standing Order under the old Rule 112, provided that all evidence in divorce cases taken before a Committee, which in the opinion of the Committee ought not to appear in the Journals, should be entered in a separate book. The scandal occasioned by the printing of the evidence in the Campbell case in 1876, and rendering it accessible to whomsoever chose to ask for a copy, led to the passing of this order in 1877.

For some years after, the evidence was printed, but was not inserted in the Journals. In 1884, the publication in the Journals was resumed.

In the session of 1885, newspaper reporters were excluded from the Committee Room during the taking of the evidence in a divorce case, and since then there has been no attempt by the press to publish *verbatim* reports of the evidence. *Senate Journals, 1885, p. 323 (i).*

The draft Rules contained a provision for hearing *in Camera* which was struck out by the Special Committee. In 1888, the printing of the evidence in a case of impotency, led to a lengthy discussion in the Senate, as to the propriety of the Committee permitting it, and it would seem in the interest of public morality and decency that some provision for hearing *in Camera* should have been conserved to the Committee. The Ecclesiastical Courts so heard cases if decency required it. In England, the Divorce Court may hear a suit *in Camera*, if for nullity or judicial separation. By consent, however, where the facts may have a more than usually prejudicial effect upon public morality, it is customary in that Court to take suits for dissolution also *in Camera (j)*.

The eminent jurist, Edward Livingston, in his admirable Code of Procedure provides for the cases in which publicity of legal proceedings may be limited. He remarks: "Although publicity is of the highest importance in the administration of justice, yet public morals require that certain investigations should form exceptions to this rule." A chapter in the Code, therefore, provides that in certain cases (*e. g.* rape or adultery) "the details of which would foster passions injurious to society," only the officers of the court, the jury sworn to try the case, and such persons, not exceeding ten for each party, as the complainant and the accused may desire, shall be admitted, and no others shall be present on the trial—and by another article in the Code any person publishing any indecent details of the evidence, is subjected to heavy fine and imprisonment.

(2) The plain provision of the Rule is to confine the distribution

(i) In France there is a penalty of twenty thousand francs for publishing the details of divorce cases.

(j) Dixon on Divorce, 1883, p. 268.

of the evidence to the persons named, with the object of limiting the number to what is actually necessary to determine the case. It is assumed, however, that counsel for the parties shall be entitled as heretofore to a limited number of copies.

This Rule does not charge anybody with the responsibility of distribution, but the Committee will doubtless confide this to the Clerk of the Committee or some other responsible official in the Senate.

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## RULE D.

### *Notice of Application to be Advertized six Months.*

Every applicant for a Bill of Divorce shall give notice of his or her intended application, and shall specify therein from whom and for what cause such divorce is sought, and shall cause such notice to be published during six months (1) before the presentation of his or her petition for the said Bill, in the *Canada Gazette* and in two newspapers published in the District of Quebec, Manitoba, British Columbia or the North-West Territories, or in the County or Union of Counties in other Provinces, wherein such applicant usually resided at the time of the separation of the parties; but if the requisite number of papers cannot be found therein, then in an adjoining District or County or Union of Counties. Notices given in the Provinces of Quebec and Manitoba are to be published in one English and one French newspaper, if there be such newspapers published in the District, but otherwise shall be published in each newspaper in both languages. The notice may be in the (2) subjoined form. If a notice given for any Session of Parliament is not completed in time to allow the petition to be dealt

with during that Session, (3) the petition may be presented and dealt with during the next ensuing Session, without any further publication of such notice.

This is the first Rule regarding procedure proper. General directions are given, supplemented by a form, which must be complied with accurately, the object being to give the party affected by the bill and the public, due notice. Although by Rule W the form of notice of application is directory, it should not be departed from. It may happen, however, that a case presents a complication of grounds upon which relief is sought. The notice should be as comprehensive as possible, as any unnecessary allegations may be subsequently dropped. As to form of describing causes for divorce, see notes to Form A *infra*.

(1) Six months public notice has been regarded as unnecessarily long. There are those, however, who recommend that there should be a *locus pœnitentiæ*, —so to speak—from which it is said the best effects have been found to flow, as it not only affords the parties leisure for reflection, but gives friends an opportunity to interfere (k).

The six months publication must be completed before the presentation of the petition in the Senate.

The Rule would seem to contemplate the publication of the notice in each issue of the local newspapers (l). The practice heretofore has been to publish it once a week, in papers published oftener than once a week, and the Standing Orders Committee on Private Bills have always accepted this as sufficient. As the *Canada Gazette* is published only once a week, it may be assumed that a weekly publication in the local newspapers will also be sufficient.

The expense of publication is usually considerable, but a little judicious arrangement by the Solicitor may result in a considerable reduction.

In the Commons, the Standing Orders respecting Private Bills, apply to divorce bills, and the application must be adver-

(k) *Macqueen's Law of Divorce*, 1860, p. 7.

(l) The newspaper publication of

notice is not required by the Rules of the House of Lords.



tised for two months during the interval of time, between the close of the preceding session and the consideration of the petition.

It is needless to point out that the notices in the *Gazette* and local newspapers must correspond in every particular. Two copies of local newspapers containing the notices should be preserved by the Solicitor for use in proving compliance with the Rule.

(2) The Form A will be found *infra*.

(3) The conclusion of this Rule, providing that when the notice for any session is not completed in time to allow the petition to be dealt with during that session, the petition may be presented and dealt with during the next ensuing session, without any further publication of such notice, does not apply to the House of Commons. The bill must be re-advertized for two months in the usual way.

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### RULE E.

#### *Service on Respondent of Copy of Notice of Application —Provision for Substitutional Service.*

A copy of the said Notice shall, not less than one month before the date of the presentation of the Petition, at the instance of the applicant, be served personally (1) on the person from whom the divorce is sought, when that can be done. If the residence of such person is not known or personal service (2) cannot be effected, then if, on report of the Committee as hereinafter provided for, it be shown to the satisfaction of the Senate that all reasonable efforts have been made to effect personal service and, if unsuccessful, to bring such notice to the knowledge of the person from whom the divorce is sought, what has been done may be deemed and taken as sufficient service.

Natural justice requires that no one should be condemned unheard, or his or her rights or *status* affected without affording opportunity for defence. Hence the provision for service of notice of application and afterwards of copy of the bill of divorce under Rule J.

(1). The really most important service is at this stage, because it puts the respondent on the alert, and where practicable it should be personal. Personal service is not defined, but it may be taken to mean the serving the respondent with a copy of the notice as published in the *Canada Gazette*. The person making the service should have a duplicate of the notice with him and he should deliver one copy and retain the other. On the latter he should endorse the time and particulars of the service. The copy should be left with, and not merely shown to, respondent.

(2). When personal service cannot be effected, the declaration should show that every reasonable effort has been made to bring the matter to the notice of the respondent. As to what may be considered reasonable efforts, the principles of practice laid down in the Superior Courts of law may be looked to as a guide. The applicant should detail the attempts and then show why service has not been effected. If the notice has come to the knowledge of the respondent or if he or she wilfully evades service, the circumstances should be set out in the declaration. Various modes of substitutional service from which it was presumed that notice must have reached respondent, have been accepted by the House as sufficient. In the Harris case (*m*) service was upon the authorized agent of petitioner. In the Beresford case (*n*) the service was upon the seducer with whom the respondent was then living.

In the Gardiner case (*o*) notice of application was given for the session of 1880, but in consequence of Parliament meeting earlier than usual the notice was not published the full six months. Respondent was served personally with a copy of that notice. The publication was renewed for the session of 1882 but personal service was not effected owing to inability to find respondent. Her solicitors, however, accepted service in writing

(*m*) Journals Leg. Coun., 1844-5.

(*n*) Ibid 1852-3.

(*o*) Senate Journals 1882, p. 50.

for her. The House considered the attempts to effect personal service and the substitutional service sufficient.

In the Cox case (*p*) the declaration of service was defective in that it did not state the place where respondent had been served. The House accepted a declaration producing a telegram from respondent's attorney in California admitting that he had received notice of the application.

The declarations in the Ash case (*q*) showing the ineffectual attempts to find respondent and the services upon his relatives, will be found instructive.

The Solicitor must take the responsibility of advising on this head as to the service of the notice, bearing in mind that the Committee only recommends the acceptance or rejection by the House of what may be done.

The expression "one month" means a calendar month. Revised Stat. of Can., 1886, chap. 1, Sec. 7, sub-Sec. 25.

## RULE F.

*Present Petition within first 30 days of Session.*

No petition for divorce shall be received after the first thirty days of each session.

This Rule will prevent these Bills being delayed to the close of the session, when there is a rush of general business. It is in the discretion of the House to receive a petition for a Private bill, notwithstanding the expiration of the time limited. In such case, a short petition asking for leave to bring in a petition should be presented. But it is apprehended that very strong grounds must be shown for asking the indulgence of the House (*r*).

*By the Senate Rule 57, "All Private Bills are introduced on Petition," &c.* As to the Petition see Rule G. and notes thereto and Form C.

(*p*) Ibid 1885, p. 31.

(*q*) Ibid 1887, p. 30.

(*r*) See remarks of Senator Abbott,

Senate Debates, 1888, p. 247—for Rule in these cases is now emphatically stringent.

## RULE G.

*Contents of Petition—Grounds for Relief—Negative Condonation, etc.—Verification by Declaration.*

The petition of an applicant for divorce must be fairly written and must be signed (1) by the Petitioner, and should briefly set forth (2) the marriage, when, where and by whom ceremony was performed, the grounds on which relief is asked and the nature of the relief prayed, and should also negative (3) condonation, collusion and connivance (4). The allegations of the petition must be verified (5) by declaration of the Petitioner, under the "*Act respecting Extra-Judicial Oaths.*"

Proceedings in Parliament are commenced by three petitions, addressed respectively to the Governor General, the Senate and the House of Commons.

(1) The petition must not be signed by the Solicitor or Counsel, but by the petitioner. If unable to write, it is assumed a signature in the manner prescribed by the Wills Act of Ontario, Rev. Stat. 1887, Cap. 109, Sec. 12, may be deemed sufficient, as follows:—" *It shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction.*"

The cases showing what has been held to be a signing under the Statute of Frauds may also be suggestive. In the case of a deed where a person is incapacitated from signing by infirmity or want of instruction, he may either make a mark by way of signature to the deed, or it may be signed by a stranger for him at his request and in his presence—and *possibly*, in any very exceptional case, signature by a specially authorized attorney might be accepted as a sufficient compliance with the Rule (5).

(5) In the Harris case (1844-5) a Petition signed by the Attorney or Solicitor for the Petitioner, who was not in Canada, was accepted by the Legislative Council. Another instance is mentioned in Macqueen's House of Lords Practice, p. 668.

(2) A general form of petition has been given to secure uniformity—See Form C *infra*.

According to the practice of Parliament the Petition should describe the parties, and state the date and place of marriage, the issue and the cohabitation, property brought on the marriage, and settlements made. The separations, if any, with the causes occasioning them ought to be shortly stated. In the Whiteaves case, 1868, the Bill contained a clause annulling the marriage settlement.

The circumstances upon which the claim for relief is based should be explicitly and sufficiently set out in the petition and preamble of the Bill, otherwise the Bill may be rejected (*t*).

(3) Requiring condonation, collusion and connivance to be negatived will be a warning to people that any of them is an answer in defence, and may save many protracted inquiries (*u*).

(4) As to definitions of condonation, collusion and connivance, see Rule O.

(5) The verification of the petition by a declaration is an important step towards securing good faith in applications.

As far back as 1798, Lord Loughborough, in seeking to amend the Standing Orders of the English House of Lords, said : “ It might be proper to call upon the party presenting a petition “ to make oath to the truth of the facts set forth in it. If a man “ was acting fairly and honestly, it could be no hardship to call “ upon him to prove the truth of the assertion by an oath.”

The function of the preliminary declaration is to rebut the suspicion of collusion, connivance and condonation ; that the application is honest and real, and not fictitious ; so that, whether well or ill founded on the merits, it is at all events fit that Parliament should entertain it. The declaration, so to speak, is to open the portals of justice, but to have little and, perhaps, no weight in the ultimate result.

In England, Scotland, and the State of New York, the complaint must be thus verified by oath.

(*t*) Senate Journals, 1869, p. 165.

(*u*) Senator Gowan, Senate Debates, 1888, p. 64.

## RULE H.

*Deposit of Copy of Bill—Payment of Printing Expenses and \$200 fee.*

The applicant shall deposit (1) with the Clerk of the Senate, eight days before the opening of Parliament, a copy, in the English or French language, of the proposed Bill of Divorce, and therewith a sum sufficient to pay for translating and printing 600 copies thereof in English and 200 copies in French. The translation shall be made by the translators of the Senate, and the printing shall be done by the contractor.

No petition for a Bill of Divorce shall be presented unless the applicant has paid (2) into the hands of the Clerk of the Senate the sum of two hundred (\$200), towards expenses which may be incurred during the progress of the Bill, and the said sum shall be subject (3) to the order of the Senate.

(1) Eight days before the opening of Parliament a copy of the bill is to be deposited with the Clerk of the Senate. This is usually done through the Parliamentary Solicitor. It is usual to pay in at the same time the fee of \$200, and \$10 or \$15 additional to cover the cost of printing.

These may be regarded as the "Court Fees," and they constitute but a portion only of the cost attending a Divorce Bill. The advertising required by Rule D, the expenses of the applicant and his witnesses at Ottawa, the fees of the solicitor at Ottawa to watch and conduct the proceedings, are all matters for consideration; and as the total sum greatly depends upon the circumstances of the case, whether it is one likely to be vigorously contested or not, and the distance from Ottawa of the applicant and his witnesses, no estimate can be given. The applicant or his solicitor

can always gain a fair idea by submitting the circumstances of the case to any solicitor of experience in Parliamentary procedure.

As to preparing Bill and Forms of same, see under Rule K.

By Rule 59 the fee payable on a bill is paid only in the House in which it originates.

(2) The Senator presenting the petition should, at the time of presentation, be provided with a certificate from the Clerk of the Senate, declaring that the fee has been paid.

A party too poor to pay the fees in proceedings was always admitted to sue *in formâ pauperis* in the Courts. A Statute of Henry VII. enacted that every poor person having cause of action against any person should have in the discretion of the Chancellor, "writs original etc., nothing paying, etc., and counsel and attorney for the same without reward," and the courts exercised the power of admitting to sue *in formâ pauperis* at Common law as well as under the Statute. This benevolent provision of British law may well be recognized and applied in proceedings for relief before the High Court of Parliament. The Senate at all events has the absolute control in respect to the fees and deposit it requires and the principle has been acted upon in two instances in Canada, viz.—Mrs. Campbell, in 1879, and Mrs. Morrison, in 1888. In England only one case is reported that of William Chippindall (1850) 7 H. L. Cases 497.

To proceed *in formâ pauperis*, the petitioner should, before presentation of the petition for the bill of divorce, present a petition setting out the proposed application for a Bill, the poverty of the petitioner and other facts relied upon for seeking the indulgence of the House. This should be verified by a declaration which may contain any other facts that might justify the Committee in reporting to the House that the prayer of the petition be granted.

(3) According to the Rule as it was originally framed in 1847, it was evidently not intended that the deposit (then \$20) was for anything more than would be sufficient to pay the expenses incurred in the preparation and progress of the bill through the House (*v*).

(*v*) Rule 69, Leg. Co. Journals,  
1847.

And the sum of \$200, required by the present Rule, is towards expenses that may be incurred during the progress of the Bill, and the rule expressly makes it subject to the order of the Senate.

If a divorce bill is rejected or not prosecuted to a conclusion, the petitioner is entitled, as a matter of right, to whatever remains of the deposit after paying all expenses (*w*).

In the White case, (*x*) the Select Committee in their report recommended that \$20 be paid to Respondent towards his travelling expenses and that same be paid out of the contingent fund of the Senate but on the understanding that it would come out of the \$200 deposit, if any of it was left after payment of the expenses.

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### RULE I.

#### *Material Necessary on Presentation of Petition—Reference to Committee,*

The petition when presented (1) shall be accompanied by the evidence of the publication of the notice (2) as required by Rule D, and by declaration in evidence of the service of a copy thereof as provided by Rule E, and by a copy of the proposed Bill. (3) The petition, notice, and evidence of publication and service, the proposed Bill, and all papers connected therewith shall thereupon stand as referred, without special order to that effect, to "The Select Committee on Divorce."

(1) The Solicitor must obtain the sanction of a Senator to the use of his name as to presenting the petition and bringing in the bill. The name should be endorsed on the petition and printed on the back of the bill. The Senator presenting the petition should be furnished with all the material required to accompany it, such as the petition itself, the certificate of the Clerk of payment of fees, declaration of publication and of service, and a copy of the proposed bill.

(*w*) Senator Miller, Senate Debates, 1888, p. 778.

(*x*) Senate Debates 1888, p. 778.



(2) The most convenient manner of proof of publication will be by declaration, accompanied by the newspapers marked as exhibits. The declaration may be made by a clerk or other person who knows of the publication. If for want of newspapers in the district or county in which the parties reside, publication has been necessary in the adjoining district or county, the absence of such newspapers should be stated in the declaration of publication.

(3) The former practice required proof on oath of the service or attempts made to effect it to the satisfaction of the Senate. This was done by the attendance at the bar of the Senate of the person making the service, and there submitting to a series of written questions to which he made written answers. This was a very tedious and unreliable mode of procedure. Occasionally proof was made by affidavits, and latterly by declarations under the Statute, which led to uncertainty and lack of uniformity. The removal of this portion of the proceedings from the Senate Chamber to the Committee is an improvement, as proper and deliberate scrutiny will be thus secured.

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## RULE J,

### *Duty of Committee on first Reference—Supplemental Proof of Service—Special Service of Copy of Bill.*

It shall be the duty of the Committee to examine (1) the Notice of application to Parliament, the Petition, the proposed Bill, the evidence of publication and of the service of a copy of the said notice, and all other papers referred therewith, and if the said notice, petition and proposed Bill are found regular and sufficient, and due proof has been made of the publication and service of the said notice, the Committee shall report the same to the Senate.

If any proof is found by the Committee to be

defective (2) the Petitioner may supplement the same by statutory declaration to be laid before the Committee.

(3) The Committee may, if the circumstances of the case seem to require it, recommend a particular mode for service of a copy of the Bill upon the party from whom the divorce is sought, before the second reading of the Bill.

This is the complement of the previous Rule I, and points out the duty in detail. No investigation should be had of the facts charged, if all the preliminary requirements have not been fulfilled.

In the examination of the papers, three things should be looked to: (i) that the notice and petition agree in describing the ground and measure of relief sought; for example, if the notice asks for a bill of divorce on the ground of adultery, the petition should not set out grounds which would be sufficient to nullify, *not dissolve*, a marriage.

(ii) That the publication is perfect. The House has always been very exacting in observing its rule as to publication. In the Cox case the publication of notice was two weeks short of completion. The Standing Orders Committee recommended a suspension of the Rule requiring six months publication, but the House referred the report back to the Committee, and the petition was not reported until the full period had expired (y).

In the Tudor-Hart case, 1888, a question arose before the Committee on Standing Orders on the publication of notice in the *Canada Gazette*. The notice was sent to the Queen's Printer and first appeared on 8th January, 1887. Owing to a misunderstanding between the Queen's Printer and his clerk who had charge of the printing of the *Gazette*, it was withdrawn from the *Gazette* before the six months were completed. The publication was continued for six months in the local papers. Upon discovery of the error, petitioner completed publication in the *Gazette* for the two months short, but the publication was not simultaneous with that in the local papers. The Queen's Printer filed with the Committee his

(y) Senate Debates, 1885, p.49.

declaration assuming responsibility for the error. Personal service of the notice of the application had been made upon respondent upon two occasions. The publication was held sufficient under the circumstances. It was considered that as the Queen's Printer was to be regarded as an officer of Parliament, his mistake or that of his subordinate should not operate to the prejudice of an applicant (z).

(iii) That there has been due service of the notice. As to modes of service, see remarks under Rule E. Care should be taken to sufficiently identify respondent, as the person served, and the declaration should show the circumstances leading to such identity (a).

If it can be fairly inferred that notice of the intended application has come to the knowledge of the party against whom the divorce is prayed, it may be reasonably concluded the proceeding will be watched if opposition be intended (b).

(2) If the form of the proof is defective, the Committee may, instead of rejecting the application, permit petitioner to supplement it. This does not imply a re-service of the notice of application, but only extends to some fact omitted from the declaration of service.

(3) The last clause of the Rule is suggestive and may be of practical value, if personal service of the notice of application has not been effected.

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## RULE K.

### *First Reading of the Bill—Suggestions as to Preparing the Bill.*

Upon the adoption of the Report of the Committee, the Bill may be introduced and read a first time.

Under the former practice, after proof of service of notice at

(z) Senate Debates, 1888, p. 167,  
&c.

(a) Senator Kaulbach, Senate De-  
bates, 1888, p. 301.

(b) Senator Gowan, Senate De-  
bates, 1888, p. 64.

the bar of the House, the petition was presented and then stood referred, without motion to the Committee on Standing Orders and Private Bills, for investigation as to notice. Upon report from that Committee to the House, the bill was read a first time. Now the reference is direct to the Committee on Divorce.

After the motion for the first reading, a motion fixing the date for the second reading is made. Under Rule L, it cannot be less than fourteen days after the adoption of the Report of the Committee. The period of fourteen days is unnecessarily long, and, in the discussion on the draft rules, Senator Gowan sought, without success, to reduce it to eight days.

All bills are read three times in each House. The first and second readings are taken before the hearing of the evidence in support of the preamble of the bill, and the third reading takes places after the Select Committee reports on the evidence. It is open to any member of either House to move its rejection at the first or any subsequent reading of a bill. As a rule, however, this is not done. The merits of a bill are left for discussion by the Select Committee. Cases do, however, sometimes occur when members of the House through which the bill is passing, either move its rejection, or move some amendment by adding or striking out clauses. An instruction to the Committee may also be moved.

**The Bill and its Preparation.**—In the preparation of the bill care should be taken that the statements and deductions in the preamble correspond with the statements and deductions in the Petition

The preamble ought to set out with a statement of the date and place of the marriage sought to be dissolved, describing sufficiently the parties and the ceremony, if any, which may have taken place. It ought to state shortly in what manner and for what length of time the parties have lived together as man and wife, subsequently to marriage; also whether any, and if any, what issue has been born of the marriage, giving ages and names. If there should have been a separation before the commission of adultery, the fact and the circumstances ought to be stated in the preamble. If a deed of separation was executed on the occasion of such separation, the deed should be mentioned. The preamble proceeds in the next place to state the charge of adultery,

the name of the party (if known) with whom the crime has been committed, and the period when the guilty intercourse commenced. The preamble ought also to state whether the parties are still cohabiting in adultery; and it ought specially to aver that the petitioner has had no intercourse with the guilty spouse since the discovery of infidelity. It is the office of the preamble expressly to negative such intercourse; or if such intercourse cannot be negated, to state it with such accompanying explanation as may tend to neutralize its effect. If the adultery has been committed with more than one person, the preamble ought to specify the several persons with whom the commission of the crime is intended to be proved; for adultery, not specially charged, cannot be proved (c). If an action at law has been resorted to by the husband against the adulterer, the facts, verdict and judgment should be stated, but it is not now imperative that any such action should have been brought. The preamble then alleges the prayer of the petition for relief, the proof of the allegations in the petition and the acts of adultery therein set forth, and that it is expedient that the prayer of the petition should be granted.

There are usually three enacting clauses. The first of these enacts that the marriage is thereby dissolved, and shall be from thenceforth null and void to all intents and purposes. This is the principal clause in the Bill, from which the others follow as a matter of natural, and indeed, inevitable consequence. The effect of divorce is that the *vinculum* is entirely broken, and the man and wife stand in the same position as if the other were dead (d). The second clause enacts that the petitioner may at any time thereafter contract matrimony, as if the dissolved marriage had not been solemnized. The third clause enacts that the issue, if any, of such second marriage, shall have and possess the same rights in every respect as if the first marriage had never been solemnized. In a few instances further relief has been enacted, as in the Whiteaves case, 1868, (e), the marriage contract was declared void. In the Hollwell case, 1878, (f), the husband was barred of all claim in the

(c) This is laid down in Macqueen's House of Lords Practice, p. 505, but the practice in Canada has been to charge adultery generally.

(d) Edward's Law of Husband and Wife, 1883, p. 73.

(e) 31 Vic., cap. 95.

(f) 40 Vic., cap. 89.

estate and effects of the petitioner. In the Riddell-Herchmer, 1887, (g), Tudor-Hart, 1888, (h) and Morrison cases, 1888, (i), the wife petitioners were given the sole custody of the infant children. This relief will usually be granted the mother in cases where the children could not properly be allowed to remain with the father. The Bill in the Campbell case, 1879, (j), provided for a separation, maintenance of the wife and children by the husband, the custody of the children and authority to the Court to enforce the provisions of the Act.

In the English Parliamentary divorce practice there are several precedents (k) showing that when the wife had brought her husband a fortune, provision was made in the bill for her future support, notwithstanding the establishment of her guilt, Parliament declining to allow her to be left in a state of destitution.

In the English House of Commons a functionary was appointed to watch the delinquent wife's interest and make stipulations for her. The performance of this duty was an ambition in the House and the member chosen for this post was designated "The lady's friend" (l).

There is no instance in Canada of any such provision on behalf of the guilty wife, and it is believed that its injustice and tendency to encourage immorality would be so obvious that any attempt to seek it would be at once rejected.

It might be otherwise, however, *where the wife was the petitioner* and her conduct was above suspicion. If the husband had large means or the wife had brought him a fortune, and the

(g) 50-51 Vic., cap. 131.

(h) 51 Vic., cap. 111.

(i) 51 Vic., cap. 110.

(j) 42 Vic., cap. 79.

(k) Macqueen's House of Lords' Practice, 1842.

(l) In Atkins case, before the House of Lord in 1887, the petitioner had been obliged by the state of his health to separate and live apart from his wife. She was subsequently guilty of adultery. Their lordships thought, that under the circumstances, some pecuniary allowance should be made for the wife and at the conclusion of the case an opportunity was afford-

ed Counsel to come to an agreement as to the sum. £700 was agreed upon, and the following clause was inserted in the Act: "And whereas it is expedient to make provision for the support of the said Mary Ellen Atkins, and whereas the said R. Atkins has agreed to pay to the said Mary Ellen Atkins the sum of £700, and the said Mary Ellen Atkins has agreed to accept the same. Be it further enacted that the said R. Atkins shall forthwith, on the passing of this Act, pay to the said Mary Ellen Atkins the said sum of £700."

result of her divorce would be to leave her destitute, Parliament, in the exercise of its discretionary powers, might be disposed to make some provision for her. This principle was recognized in the Campbell case, which was one for separation, or divorce *à mensâ et thoro*.

Convenient forms of bills of divorce will be found in the appendix hereto.

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### RULE L.

*Second Reading—Notice to be posted on Senate door and served—Reference to and report of Committee on proof of service.*

The second reading of a Bill of Divorce shall not take place till after fourteen days from the adoption of the report of the Committee, and a notice of the second reading (1) shall be affixed to the door of the Senate during that period.

A copy of such notice and of the Bill shall, (2) at the instance of the Petitioner, be served personally, if practicable, on the party from whom the divorce is sought, or served in such other manner as may have been prescribed on Report of the Committee, and proof of such service shall be adduced before the Committee, who shall report thereon to the Senate.

Upon the adoption (3) of the report of the Committee as to the sufficiency of such service the Bill may be read a second time.

When the parties separate by Deed or by Articles, immoral or questionable stipulations are sometimes introduced. Thus for example, the husband almost invariably covenants that the wife shall be free from the marital control. This covenant embarrassed any divorce bill that might have been brought against her in

Parliament ; because the Lords held that a husband who gave his wife the freedom imported by such a covenant was himself to blame if she subsequently committed adultery. The Lords, indeed, considered that the wife's virtue depended in no small degree on the husband's vigilance. Hence they had a Standing Order<sup>(m)</sup> which required that every husband suing divorce *à vinculo* should be examined at the Bar to ascertain whether "he had, as far as in him lay, released his wife from her conjugal duty by deed or otherwise," and that notice should be given the Respondent to enable her to attend on the second reading of the Bill and contradict him if she was so disposed <sup>(n)</sup>.

(1) The Clerk of the Committee fills up the Notice of the Second Reading, procures the signature of the Clerk of the Senate thereto and affixes the Notice to the door of the Senate.

(2) As many duplicate copies as required of the Notice and of the Bill, all signed by the Clerk of the Senate, may be obtained upon application to the Clerk of the Committee.

The service should be personal if practicable, and the Committee will require to be satisfied that the party served with the Notice and the party charged by the Bill, are one and the same individual <sup>(o)</sup>.

The provisions as to service of Notice of the Second Reading in Rule J and the second clause of Rule L are evidently intended to apply to cases in which the service of the Notice of application has been substitutional and the Committee have recommended to the House that service of Notice of Second Reading be effected in the like or other manner. In cases in which the service of the Notice of application has been personal but in the interval Respondent absconds, conceals or otherwise places himself beyond the reach of personal service, the petitioner will doubtless be obliged to follow the practice observed in the House of Lords, and present a petition to the Senate praying that substituted service of the copy of the Bill and Notice of the Second Reading be made in the particular manner desired. Under Rule A the Petition will then be referred to the Select Committee to be dealt with.

(m) See Appendix for form of Notice of Second Reading.

(n) Macqueen's Law of Divorce, 1860, p. 98.

(o) Macqueen's House of Lords Practice, *Mildmay's Case*, p. 651.



As to modes of substitutional service see remarks under Rule E.

In Joynt's case before the House of Lords in 1888, the petitioner's Solicitor testified that he had transmitted to G. in New York by registered letter, certified copy of the Bill and the Order for the second reading, with copy of both, for service on Respondent, and that he had subsequently received the copies back by registered post with affidavit of service on Respondent sworn before the British Consul. The affidavit was read and service allowed.

The Respondent is not entitled to any particular number of days notice, but it has been the practice to allow him or her a reasonable time within which to attend.

In the Smith case (1885), Respondent being served on 19th February with the Notice of the Second Reading for the 20th February telegraphed the Clerk of the Senate for a week's time to attend and oppose the Bill. The Second Reading was not delayed but the Respondent was permitted time for attendance (p).

(3) The Chairman of the Committee should move the adoption of the Report, and the Senator in charge of the Bill will move its second reading.

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## RULE M.

*Reference to Committee to hear Evidence—Report thereon  
—Minority Report.*

When the Bill is read a second time it shall be referred (1) to the Select Committee on Divorce, who shall proceed with all reasonable despatch to hear and enquire into the allegations set forth in the preamble of the Bill and take evidence touching the same and the right of the petitioner to the relief prayed

The Committee after such hearing and enquiry

(p) Senate Debates, 1885, p. 51.

(2) shall report thereon to the Senate, and such Report shall be accompanied by the testimony of the witnesses examined, and by all papers and instruments put in evidence before the Committee. The minority may bring in a Report (3) stating the grounds upon which they dissent from the Report of the Committee.

When any alteration in the preamble or otherwise in the Bill is recommended (4), such alteration and the reasons for the same shall be stated in the Report.

When the Committee report that the preamble of the Bill has not been proved to their satisfaction, the report shall state the grounds on which they have arrived at such a decision, and no Divorce Bill so reported upon shall be placed on the Orders of the Day (5), unless by special order of the Senate.

Formerly petitioner had to appear below the Bar of the House accompanied by his Counsel to submit to examination as to collusion or connivance, but the examination was always referred to a Select Committee.

Although the new Rules are silent on the point, the Committee will, doubtless, expect petitioner to attend before them to answer any question they may think fit that he should answer.

(1) Rule I provides that the matter "shall stand as referred without special order." This Rule differs in terms from Rule I, and would seem to imply that some action should be taken by the House, directing it shall be referred to the Select Committee.

(2) In all Courts the party who seeks to set the tribunal in motion makes a *statement* or *charge*—an assertion that a wrong has been committed, by whatever name it may be designated. In the proceeding by private bill before Parliament praying relief this statement or charge is made in the petition and specifically followed in the bill.

Though in Civil cases before the Courts questions of law and

fact are worked out into distinct issues, in Criminal courts there is no attempt made to separate the law and fact prior to the hearing. In the reference to the Select Committee on divorce, they are required to hear and enquire into the allegations set forth in the preamble of the bill, and to take evidence touching the same, *and* the right of the petitioner to the relief prayed—thus, it seems to the author, putting the charge set forth in the preamble before the Committee very much in the same shape as an Indictment before a Court and Jury. But while the functions of the Court and Jury are, theoretically at all events, separate, the functions of the Committee are double, and embrace all that is necessary to the proper conduct of the hearing and enquiry with a view to a finding upon the allegations and facts charged, and to the decision upon the law and facts as well as in respect to the mode and matter of relief.

Where the wife has no separate estate or property of her own, or where her means are insufficient to enable her to sustain the expense of the defence, the House will order the husband to pay her a sum of money; the amount of which must of course be governed by a due consideration of the circumstances of the case. There are several such cases mentioned in Macqueen's Practice and two or three examples in Canada. In the Campbell case (1879) the petitioning husband was directed to pay the fees of the wife's counsel who opposed his application, which fees were taxed by the Chairman of the Committee at \$500. He was also obliged to deposit \$250 toward the payment of the expenses of her witnesses. Her counsel subsequently recovered from Campbell \$350 or \$50 a day for seven days for prosecuting the wife's cross petition for a judicial separation. In the Gardiner case (1882) the wife's counsel was allowed a retaining fee of \$20, and \$20 a day for each day's attendance. In the Nicholson case, (1884) the House directed the wife's counsel to be paid \$20 the first day, and \$10 each day thereafter, and \$2 a day for herself for expenses in Ottawa.

(3) If the preamble be altered it is usually done to make the allegations correspond with the facts proved or to correct verbal inaccuracies. In respect to the enacting parts of the bill, the Committee determine whether they are just and appropriate and

warranted by reason of the wrong committed—whether they are such as should be enacted having regard to the nature of such wrong and the interests of public morals and the well-being of the community. The last clause of this Rule permitting a report from the minority, will ensure a review by the House of adverse opinions on the merits of the case. The same result was formerly arrived at by means of a protest. Whatever may be the decision of the Committee, the House is finally to pass upon the Report.

(4) The third paragraph is the substance of Rule 67, applying to Private bills generally.

(5) As to the last paragraph, an adverse vote involves an affirmative vote to be put on the Orders of the Day.

If the promoter of the bill desires to withdraw it owing to the evidence not supporting the preamble, he should ask the Select Committee for leave to do so, and then the evidence need not go before the House (*g*).

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## RULE N.

### *Amendments in Committee.*

The Chairman of the Committee shall sign, with his name at length, a printed copy of the Bill, on which the amendments recommended shall be fairly written, and shall also sign, with the initials of his name, the several amendments made and clauses added in Committee; and another copy of the Bill with the amendments written thereon shall be prepared by the Clerk of the Committee and filed, or attached to the Report.

This is a repetition of Rule 67, applicable to all Private bills. In the case of bills being amended in Committee, the Chairman "*is to explain to the Senate the effect of each amendment*" (*r*).

(*g*) Senator Miller, Debates, 1888,  
p. 350.

(*r*) Senate Rule 67.

## RULE O.

*Evidence necessary to support Bill—Defences admissible—  
Intervention of Minister of Justice.*

If adultery (1) be proved (2), the party from whom the divorce is sought may nevertheless be admitted to prove condonation (3), collusion (4), connivance (5) or adultery (6), on the part of the Petitioner.

Condonation, collusion or connivance between the parties is always a sufficient ground for rejecting a Bill of Divorce, and shall be enquired into by the Committee (7). And should the Committee have reason to suspect collusion or connivance and deem it desirable that fuller enquiry should be made, the same shall be communicated to the Minister of Justice, that he may intervene and oppose the Bill should the interest of public justice in his opinion call for such intervention.

(1) "**Adultery**," declared Livingston, in his Code, "is a term of which the meaning is precisely that which it bears in "common <sup>Parliamentary</sup> practice." The following general definition has been adopted by English writers:—Adultery is that act by which the marriage bed is violated. It is a crime which can only be committed by a married person, and it is *adultery* if either party be married (5). Rule O is alike comprehensive and suggestive, and gives ample room for extensive observation and discussion.

Before entering into details it may be observed, that the first question to be determined upon a bill of divorce is *the act of adultery*. If that is established then comes the question, what

(5) Whether before Parliament or a Court, a divorce case for adultery may fairly be regarded as more in the nature of a criminal than a civil proceeding, at least the respondent is charged with an offence more grave

than many crimes, for it is one of those immoralities with which merely to be charged, especially in the case of a woman, is a blot that leaves its mark behind.

answer or defence can be made? The Rule expressly indicates four defences: condonation, collusion, connivance or adultery on the part of the petitioner. Whether any defence be urged or not, it is made, for obvious reasons, the duty of the Committee to inquire into the three first mentioned, and into the fourth, if alleged by respondent against the bill. It may be assumed that if any one of the four be established it is a sufficient ground for rejecting the bill; the chief difference seems to be that the Committee only enquires into the allegation of the petitioner's adultery when invoked to do so by the respondent. But it is submitted that Parliament, and consequently the Committee, is not limited to the grounds referred to in refusing to report a bill for relief, but may look at all the circumstances of a case and refuse to confer an advantageous privilege upon an unworthy suppliant, when for example, the condition upon which claim is made has grown out of the individual's own iniquity. "Nay more," as urged by Senator Gowan, "Parliament may and ought always to have in regard, not merely the question as it affects the parties, but the effect in relation to morals and good order—the effect which the passing of a particular law might have upon the well-being of the community. Parliament, as the supreme power, has its duties and responsibilities, and cannot compromise the well-being of society, but is bound to consider what would most tend to the public good.

It will be here convenient to treat of the proofs necessary to be made and the defences (if any) that may be raised to a petition for relief.

### **Proof of Marriage—A Valid Marriage Necessary.—**

The *first* point to be proved is the marriage, for without a valid marriage there can be no adultery. The marriage, therefore, must be established before evidence of adultery is admitted.

The essentials of a valid marriage are, that it should be celebrated in a form valid by *lex loci celebrationis*, and between persons capable of contracting a marriage by the law of their domicile, consenting thereto and able to perform the duties of marriage. It is not necessary for the party alleging a marriage to prove, in order to make out a *prima facie* case, the separate existence of these

essentials, for a marriage is favored in law (*t*). Thus, if the celebration of a marriage be proved, the contract, the capacity of the parties, in fact the validity of the marriage, is presumed.

By the British North America Act, 1867, section 92, the power of making laws respecting the solemnization of marriage is conferred exclusively upon the provincial legislatures. In some of the provinces of the Dominion, justices of the peace are, with the resident clergy of any denomination, empowered by statute to celebrate the marriage ceremony, but, as a rule, the ceremony is performed by the clergy, subject to authorization, by the previous issue of a marriage license, or after publication of banns. This, while tending to throw around the marriage tie a halo of sanctity, secures a system of registration valuable as evidence: by the laws of their respective provinces all clergymen are required to make annual returns of the marriages celebrated by them, to the provincial authorities (*u*). In the Province of Quebec the solemnization of marriage is regulated by the Civil Code of Lower Canada, but the registration of marriage is regulated by statute.

In a new country like Canada, many of its inhabitants have been married in other lands, and in respect of these, Parliament must be reasonably satisfied that the marriage has been celebrated according to the forms required by the then existing law of the country in which it took place.

Evidence of the marriage implies satisfactory evidence of the identity of the parties. Proof that a marriage has taken place between A. and B. will not be sufficient. It must also appear that A. and B. are truly the parties whose marriage it is sought by the bill to dissolve.

Photographs are continually used in the English Divorce Courts to prove identity.

The usual course is to produce and prove the certificate of the officiating minister, or to produce and prove an examined copy of the entry in the Marriage Register, and then to call a witness who was present at the ceremony and acquainted with the parties, or if such a witness cannot be produced, then a witness who knew

(*t*) *Piers v. Piers* 2 H.L. Cas. 331 ;  
*De Thoren v. Atty-Gen.* L. R., 1  
App. C. 686.

(*u*) For interesting articles on the

Legal Degrees of Marriage in Canada,  
see Canada Law Times, 1881, Vol.  
1, pp. 509, 569, 617, 665.

See Rev.Stat.Ont., 1887, Cap. 131.

the parties when living together as man and wife. The best proof must be tendered that the circumstances of the case will admit of (v).

*Secondly :* The terms on which the husband and wife lived during cohabitation should be shown.

*Thirdly :* In case of separation prior to the adultery complained of, evidence should be given that the separation was not occasioned by the conduct of the party applying for the divorce, but was forced upon the husband or wife by the conduct of the other partner. In the case of absence, that such absence was caused by the husband's professional pursuits or was otherwise unavoidable.

**Proof of Adultery.**—With respect to the evidence of adultery, it may be safely affirmed that whatever convinces the House that the act has been consummated will be sufficient. Positive evidence of the fact is rarely attainable; and therefore, in the great majority of cases, the allegation of adultery is substantiated by circumstances from which judicial inferences and presumptions of the fact may be derived.

In his judgment, in the case of *Loveden vs. Loveden* (w), Lord Stowell thus laid down the principles which have been very generally observed upon this point :—

“ It is a fundamental rule that it is not necessary to prove the direct fact of adultery; because, if it were otherwise, there is not one case in a hundred in which that proof would be obtainable.

“ In every case, almost, the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights.

“ What are the circumstances which lead to such a conclusion cannot be laid down universally; because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances, apparently slight and delicate in themselves, but

(v) Under the English Divorce Court Act, the Petitioner being now a competent witness in all matrimonial suits is usually called to give evidence, amongst other things, of the

fact of the marriage, and, at the same time, a certified extract from the Registrar General's Office is produced as formal proof.

(w) 2 Hagg, p. 2.



“ which may have most important bearings in decisions upon the particular case. The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion. The facts are not of a technical nature ; they are facts determinable upon common grounds of reason ; upon such subjects the rational and the legal interpretation must be the same.

“ It is the consequence of this rule, that it is not necessary to prove a fact of adultery in time and place ; circumstances need not be so specially proved, as to produce the conclusion, that the fact of adultery was committed at that particular hour, or in that particular room ; general cohabitation has been deemed enough.”

In Hewat's Case, before the House of Lords in 1887, the only evidence of adultery offered, was that the respondent and the adulterer passed as husband and wife and occupied the same cabin, on a voyage to Cape Colony. The parties were identified by the witnesses before the House by means of photographs.

A woman going with a man to a brothel has been held to be conclusive proof of adultery, but not her visit to a single man's lodgings or house (x).

If a married man goes to a brothel, he being perfectly aware of the nature of the house, it furnishes a violent suspicion of his guilt, which can be rebutted, if at all, only by the very best evidence (y).

In Gifford's Case, before the House of Lords in 1887, the Bill passed upon the evidence of a witness who accompanied respondent to house of ill fame. He saw him talking to women in these houses, but could give no evidence of actual adultery.

Venereal disease in the husband long after marriage is *prima facie* evidence of adultery (z).

**Confession.**—The mere confession of the respondent unaccompanied by other circumstances will not of itself be sufficient proof of adultery. This rule has been recognized, and in some instances, very rigidly enforced by the House

(x) *Williams v. Williams*, 1 Con-sist. 302.

(y) *Astley vs. Astley*, 1 Hagg. 720.

(z) *Popkin vs. Popkin*, 1 Hagg, 767 and notes.

of Lords; but with this rational modification at the same time, that whenever collateral circumstances appear tending to the proof of adultery, evidence by confession will be received in confirmation. Such collateral circumstances, however, must be primarily established so as to lay a foundation for the reception of the evidence by confession, which, when so supported, is not only receivable, but is indeed the strongest evidence that can well be imagined of guilty consummation. For instance, if it is shown that gross indecorum, and improper familiarity has taken place, and that opportunities of privacy had occurred and had been indulged in; such facts, taken in conjunction, serve to interpret each other, and lead to the presumption that parties who have indulged in such habits publicly, would proceed to greater lengths when opportunities of privacy and concealment were offered them; a presumption which confession would confirm, and together, form substantial proof of the adultery (*a*).

In the Tudor-Hart case, 1888, *infra*, there was evidence of confessions of his guilt by the husband to his wife, and there were abundant collateral circumstances from which to infer the truth of the confessions. The Bill passed, not entirely dependent however, upon the principles here laid down.

In Joynt's case before the House of Lords in 1888, the evidence of adultery consisted of a letter of confession from respondent to her husband the petitioner, and the evidence of a policeman who saw her leave her own house at 11 p. m., to meet the adulterer, whom she accompanied to his own house and remained with him until 2 a. m., when she returned home.

The evidence of the *particeps criminis* is admissible (*b*). In Johnson's Case, 1878, *infra*, the adulterer gave evidence admitting guilt, but the adultery was established by other evidence.

If proceedings at law have been taken by the applicant and judgment recovered, it would, perhaps, be prudent to set them forth; for no reserve as to facts would be becoming in a case of the kind. If set forth the applicant should be prepared to prove them by an exemplified copy of the judgment. Where, for suffi-

(a) See *Burgess v. Burgess*, 2 Hagg. 229.

(b) *Soilleux v. Soilleux*, Consist. 376; (*Simmons v. Simmons*, 1 Robert, 566.)

cient reason, no proceedings have been taken at law, a statement touching the same might be made.

**Ante-nuptial incontinency.**—As a general rule it is not competent to the husband or the wife to plead illicit intercourse prior to the marriage ; because the marriage operates as an oblivion of all that has passed, of all that can possibly have occurred (*c*).

**Adultery after separation.**—Proof of adultery by a married man after separation from his wife coupled with other circumstances is a good ground for divorce, unless the conduct of the wife is such as to render her unworthy of relief (*d*).

**Proof of Impotency.**—In order to constitute the marriage bond, there must be the power, present or to come, of sexual intercourse (*e*). Impotence at the time of the marriage, and continuing permanently, is ground for an application to declare the marriage null (*f*).

In the only case under this head that has come before the Parliament of Canada (*g*), the Select Committee followed the practice observed under the English Divorce Act. After *viva voce* examination of petitioner, two medical experts were appointed by the Committee to inspect petitioner and respondent. The result of their examination was made verbally to the Committee.

In all cases of this class there are two distinct questions. First, whether the marriage has been in fact consummated ? and, if not, then whether this has arisen from the impotency of the party charged ? It devolves upon the petitioner to establish both these propositions. Where the evidence of the parties was in contradiction, and the only other evidence (medical) was consistent with either case, the Court declined to make a decree upon the unsupported evidence of the petitioner. Hence the importance of independent evidence (*h*).

**Proof of Bigamy.**—In the Canadian cases for dissolution of marriage on the ground of bigamy, there has always been evidence of cohabitation given. Where, however, the bigamous marriage was not consummated, it does not appear to have been quite settled in the House of Lords that adultery should also be

(*c*) Swabey on Divorce, 1858, p. 13.

(*d*) Senate Debates 1888 p. 668.  
Senator Abbott in the *Tudor-Hart Case infra* ; see also *Holwell's Case*, 1877 *infra*.

(*e*) S. v. A., 3 P. D. 73.

(*f*) *Greenstreet v. Cumyns*, 2 Phill. 11.

(*g*) The White case, 1888.

(*h*) Dixon on Divorce, 1883, p. 144.

proved. In Mrs. Battersby's case (Session 1840), the bigamy took place with a woman altogether distinct from the several women with whom the adultery had been committed by the delinquent Battersby, ten or eleven years before. The outrage was held, and justly held, to have been completed at the altar, although to strengthen the case subsequent intercourse was proved with the second wife. The trial, the conviction, the transportation and the general infamy of the husband were the things gone upon. The Bill passed.

In Mrs. Hall's case (session 1850), where the relief was given there was bigamy, but no conviction, and of course no punishment and less degradation ; yet the Bill passed.

As under the law of the land the crime of bigamy does not require cohabitation, it may possibly happen, that if the subsequent cohabitation cannot be proved, the Bill may be passed by Parliament. The adoption by the Senate of the Rules of Evidence in Indictable offences, as the Rules of Evidence in proceedings for divorce, naturally leads to this conclusion, but until the point has been settled, it will be prudent to adhere to the practice heretofore observed in Canada. Under the English Divorce Act, the bigamy must be proved ; proof that the husband has been convicted of bigamy will not suffice.

**Absolute Defences to a Bill for Divorce.**—The *absolute* defences under the present Rules of procedure to proved adultery on the part of either husband or wife, are : denial of the facts alleged, condonation, collusion and connivance, also recrimination or adultery on the part of the petitioner, or to be guilty of such conduct as would entitle the respondent to a divorce. It will be remarked that according to this Rule the adultery must be proved before the respondent will be permitted to offer evidence on any of these points. There are other circumstances, which, although not admissible as defences, may more or less influence the House in determining the fate of an application. These are noticed on page 119.

One of the methods whereby collusion or connivance may be ascertained will be by examining the petitioner, and he should always be in attendance for that purpose where possible. At the same time there may be cases of disability, where a declaration by

petitioner purging himself of collusion or connivance, might be accepted by the Committee. The safest course in all cases, is for the petitioner to make personal appearance.

(2) **Denial of Facts Alleged.**—Of this defence little need be said. The *onus probandi* of course lies on the petitioner, and the denial may be of any one or more material facts, as of the adultery, the marriage, &c., &c.

(3) **Condonation** is forgiveness with full knowledge of previous misconduct on an implied condition that the injury should not be repeated, for there is no doubt that a repetition of the same injury revives the former injury. It is not a question of law, but of fact, depending on the circumstances of each particular case (*i*).

Condonation may be express or implied, as by the husband cohabiting with a delinquent wife, for it is to be presumed he would not take her to his bed again, unless he had forgiven her (*j*); but the effect of cohabitation is justly held less stringent on the wife; she is more *sub potestate*, more *inops consilii*; she may entertain more hopes of the recovery and reform of her husband; her honor is less injured and is more easily healed. It would be hard if condonation by implication was held a strict bar against the wife (*k*).

It has been held that knowledge of what is condoned must be distinctly proved (*l*).

When the husband is once in possession of the fact of adultery committed by the wife, his continuance of cohabitation proves connivance, collusion and facility. The husband's facility to condone shows that he does not duly estimate the injury, and will make the court watch jealously his subsequent conduct (*m*).

The force of condonation varies according to circumstances; the condonations by a husband of a wife's adultery, still more repeated reconciliations after repeated adulteries, create a bar of far greater effect than does the condonation by a wife of repeated acts of cruelty, committed by a husband. In the former case the

(*i*) Dewy on Divorce, p. 18.

(*j*) Forgiveness of the offence, unless it is followed by conjugal cohabitation, will not amount to condonation. *Keats v. Keats*, 28 L. J., P. & M. 57.

(*k*) *Beeby v. Beeby*, 1 Hagg, p. 793.

(*l*) *Durant v. Durant*, 1 Hagg, Eccl. p. 733.

(*m*) *Timnings v. Timnings*, 3 Hagg, p. 83.

husband shows himself not sufficiently sensible to his own dishonour, and to his wife's contamination; and such reconciliations often repeated amount almost to a license to her future adultery, so as to form nearly an insuperable and immovable bar. Forbearance in bringing a suit even on a charge of adultery against the husband is thus noticed by Lord Stowell, in the case of *Ferrens*. "It may not only be excusable, but meritorious, in hopes of reconciliation; and there is a great difference between the husband and wife on this point" (n).

The only Canadian Case in which the question of condonation has arisen is *Gardiner's*, 1882, *infra*. It there appeared that Petitioner had retained the alleged adulterer in his employment after he suspected his wife's misconduct, and that he had continued cohabiting with her after discovery of the infidelity, but the bill was abandoned upon other grounds.

(4) **Collusion**, according to Lord Stowell, in *Crewe v. Crewe* (o) is an agreement between the parties for one to commit, or appear to commit, a fact of adultery, in order that the other may obtain a remedy at law as for real injury. Real injury there is none where there is a common agreement between the parties to effect their object by fraud in a Court of Justice. It is a fraud difficult of proof, since the agreement may be known to no one but the two parties in the cause, who alone may be concerned in it. However it is no proof of collusion that after the adultery has been committed, both parties desire a separation; it would be hard that the husband should not be released, because the offending wife equally wishes it. In evidence taken before a Select Committee in the House of Lords in 1844, Dr. Lushington described collusion to be permitting a false case to be substantiated, or keeping back a just defence, but considered it questionable whether this rule of collusion would extend to cases where recrimination, though practicable, was not resorted to.

As contemplated by the English Divorce Act, *collusion* appears to mean a conspiracy in *presenting* or *prosecuting the petition* (p) and has a wide scope, embracing cases where the original

(n) *Westmeath v. Westmeath*, 2 Hagg, supplement.

(o) 3 Hagg, p. 129.

(p) The Nicholson Case, 1883, *infra*, was rejected by the Senate be-

cause of a collusive agreement between husband and wife not to oppose any Bill of Divorce thereafter brought by either.

ground of petition may not have been connived at, but where the parties subsequently agreed to use it as a means for divorce (*q*).

The collusion to be a defence must be between the petitioner and the respondent ; and although all parties may be desirous of the divorce, still it will not be collusion unless there be some agreement made *by the petitioner*. Therefore, where the adulterer and the wife made arrangements to which the petitioner was no party, but in order that he might obtain a divorce, the bill passed (*r*).

Any communication between the opposite parties with the view to facilitating the proceedings should be avoided as it may give rise to a suspicion of collusion.

In an undefended suit for dissolution of marriage on the ground of the adultery of the wife, it appeared that the wife had given the petitioner's solicitor a photograph of herself, and attended in court at the hearing to aid in her identification, and for so doing, received money from the solicitor. The Court notwithstanding, being satisfied that there was no collusion between the petitioner and the respondent, made a decree dissolving the marriage (*s*).

(5) **Connivance** is the corrupt *consenting* of a married party to the conduct of the other of which he afterwards complains. It bars the right of divorce, because no injury was received : for what a man has consented to, he cannot set up as an injury (*t*).

" Obviously there can be no connivance at any act without  
 " some knowledge of its existence, or, at least, its proximate  
 " causes ; unless indeed the case be one in which the party  
 " accused of the connivance has laid the train leading to the  
 " result, and is yet in ignorance whether the sought for end has  
 " been reached. Therefore, in examining the conduct of a hus-  
 " band on the question of his alleged connivance at his wife's  
 " adultery, we should in most cases consider what notice of it he  
 " had or what suspicion of behaviour in her tending to it. And Dr.  
 " Lushington went on in one case so far as, on a review of the  
 " authorities, to say : ' There must be knowledge, or presumed

(*q*) *Lloyd v. Lloyd*, 1 Sw. & Tr.  
567.

(*r*) *Matthyssen's Case*, 78 House  
of Lords Journals, 851.

(*s*) *Harris v. Harris*, 4 Sw. & Tr.  
232.

(*t*) *Bishop on Marriage and  
Divorce*, 1873, Vol. II, sec. 5.

“ knowledge of the adultery, or improper familiarity leading  
 “ thereto ; not finding any evidence of this description, I pro-  
 “ nounce for the separation.’ Thence it follows, that if the par-  
 “ ties were living separate at the time of the adultery committed,  
 “ and no improper familiarities are shown to have taken place  
 “ during their cohabitation, connivance will not be presumed,  
 “ without the clearest evidence of intention and consent. On  
 “ the other hand, while the cohabitation continues, if the husband  
 “ receives a caution concerning the conduct of his wife, or if he  
 “ sees what a reasonable man could not see without alarm, or if  
 “ he knows she has been guilty of antenuptial incontinence, or if  
 “ he has himself seduced her before marriage, whereby he is put  
 “ upon his guard respecting her weakness, he is called upon to  
 “ exercise a peculiar vigilance and care over her ; and, if he sees  
 “ what a reasonable man could not permit, and makes no effort  
 “ to avert the danger, he must be supposed to see and mean the  
 “ consequences. Yet this rule should be applied with due allow-  
 “ ance for defective perception, dullness of capacity, overweening  
 “ confidence, and the like (u).

The question of connivance as a bar to divorce by reason of adultery was considered by Dr. Lushington in *Phillips v. Phillips*. (v). After a review of the decided cases, he concluded the principle to be, that the husband is barred when he has contributed to his own dishonour, not by general neglect or indifference or abandonment, but by actual connivance at particular acts of adultery, or conduct leading directly to adultery, as improper or indecent familiarities. To constitute such connivance, the cases go the length of establishing that there must be actual knowledge of the adultery or of the improper familiarities ; by actual knowledge, meaning proof, or an irresistible presumption of knowledge of the facts, which would, as the cases require, constitute a corrupt connivance. *Volenti non fit injuria*, but it must be more than indifference, inattention, over-confidence ; it must be intentional concurrence in order to amount to a bar ; though there need not be active steps taken by the husband to corrupt the wife.

The presumption of the law is against connivance ; it is not

(u) Bishop on Marriage and Divorce, 1873, Vol. II, sec. 21.

(v) 1 Roberts, 156.



readily to be assumed that any man will act so contrary to the general feelings of mankind as to consent to his own dishonor, and therefore, if the facts are equivocal or can be accounted for without the supposition of intention on his part, the court will incline to that construction (*w*).

The Smith case (1885) was rejected by the Senate on the ground of connivance. The petitioner having separated from his wife, signed an agreement not to molest her should she marry again, and subsequently he wrote recommending her to marry. She did so, and thereupon Petitioner applied for a divorce on the ground of her adultery.

(6) **Recrimination or Adultery on the part of the Petitioner.**—This is a ground of defence new in Canada, there being no case recorded in which it has been put forward. In the former Ecclesiastical Courts, the principle seems to have been, that a set off of equal guilt on the side of the party proceeding should be a defence to the relief to which that party might be otherwise entitled. The doctrine, as Lord Stowell said in *Beeby v. Beeby* (*x*), had “its foundation in reason and propriety; it would be hard if a man could complain of the breach of the contract which he has violated; the parties might live together and find sources of mutual forgiveness in the humiliation of mutual guilt.” In that case the wife’s conduct for many years had been exemplary, the husband’s most profligate, and Lord Stowell seemed inclined not to allow condonation by the wife of much of the husband’s misconduct as a reply to her plea of recrimination in the suit brought against her; observing “A man, it is true, who has forgiven adultery, cannot bring a suit; but when he complains of his wife, will her forgiveness of his previous misconduct make him a proper person to receive the sentence of the Court? Does her act bind the Court? If both are equally guilty, will her condonation make him *rectus in curiâ*, and enable him to procure a sentence? There may be cases where a wife may by forgiveness, by cohabitation, by a reformation of the husband, be so barred that an obsolete fact shall not be a defence.”

(*w*) Ernest on Marriage and Divorce, 1879, p 114. *Rogers v. Rogers*, 3 Hagg, p. 61.

(*x*) 1 Hagg. 789.

And in *Anichini v. Anichini* (y) which was a suit against the wife and she recriminated, but it was shown to be on the husband's part an act of adultery with one person some years since, and fully condoned by the wife, Dr. Lushington considered himself at liberty to pronounce for the separation at the prayer of the husband.

Apart from such condonation, the misconduct of either party at any time previous to the sentence deprived them of the relief which would be otherwise due (z).

The decisions of the Ecclesiastical Courts in respect of recrimination can hardly be regarded as of much value in Canada owing to the fact that the actions in which they took place were for divorces *à mensâ et thoro*. At that time too the wife had not attained her present position of equality with the husband, and in many of the decisions of that Court, there will be found a strong bias in favor of the husband to the prejudice of the wife.

Evidence of a set off of equal guilt was not always admitted by the House of Lords in divorce bills. That House seems to have recognized a distinction between the adultery committed by a petitioner prior to that complained of, and adultery committed subsequent; and to have rejected evidence of the petitioner's adultery, if it had been committed subsequent to that complained of. But if the recriminated adultery took place prior to that complained of by the petitioner, the House always rejected the Bill.

In Major Bland's case (a) Mrs. Bland's witnesses proved that Major Bland's conduct had been extremely culpable; it appearing among other scandalous improprieties, that he had a woman in keeping, whom he passed off as Mrs. Bland, and the Lords rejected the bill.

In Major Campbell's case (b) on the other hand, Mrs. Campbell's adultery being fully proved, her Counsel proposed to open matter of recrimination against the petitioner, alleging that he had been living in a state of incontinence, although not prior to the

(y) 2 Curt., p. 210.

(z) *Proctor v. Proctor*, 2 Consist., p. 292.

(a) Macqueen's H. L. Practice, p. 605.

(b) Macqueen's H. L. Practice, p. 590; Simmin's Div. Bill, 12 Cl. & Fin. 339.

date of the adultery charged against Mrs. Campbell—they were informed that they could not be permitted to enter into such matter.

Important questions will arise in connection with this section of the Rule. If in the course of the inquiry to establish the truth of the preamble and before it is made out, it transpires that petitioner is himself guilty of adultery, shall the respondent, if innocent of the charge brought against her, be entitled by the same proceedings, to the bill of divorce without compliance with the usual preliminary formalities of Parliamentary proceedings?

Again what will be the effect if both petitioner and respondent are proved to be guilty of adultery? In Scotland the result of mutual actions, in which the guilt on both sides is proved, is that both parties will be divorced. There is no such thing as allowing the guilt of one party to stand as a compensation for that of the other; otherwise a spurious offspring might be introduced whose claims might destroy the rights of lawful children (*c*). The Scotch reasoning is, that as adultery is a crime, both are unworthy of matrimony; they disgrace it; and their marriage should be dissolved.

#### **Other Circumstances may Influence Parliament.—**

As has already been mentioned there are other circumstances in the conduct of parties in proceeding for a bill of divorce which, although not deemed absolute bars or defences, may nevertheless influence Parliament in granting, or withholding relief, notwithstanding a case for relief may be made out in other respects.

Under the English Divorce Act if the petitioner is proved to have been guilty of unreasonable delay, cruelty, desertion or wilful separation without excuse, or of misconduct conducing to the adultery complained of, the Court is not bound to pronounce a decree dissolving the marriage, but will exercise its discretion as to whether it shall, according to the circumstances of the case, grant the relief prayed or dismiss the petition. No application to the Parliament of Canada has yet been rejected on any of these discretionary grounds, but Mac-

(*c*) Swabey's Law of Divorce 1858,  
p. 71.

queen's House of Lords' Practice (1842) shows that the House of Lords, on one or two occasions, regarded neglect or misconduct conducing to the adultery complained of a sufficient reason to refuse relief.

**Lapse of Time** as between the period of instituting the suit, and the date of the facts relied on, though not of itself sufficient, may nevertheless, under certain circumstances, form a material point in bar of the proceeding; for, although there is no limitation of time acknowledged by Parliament, still, if a considerable interval has elapsed between the date of the petitioner's knowledge of the injury and the date of the application, an inference arises to the prejudice of the petitioner, who appears *prima facie* to have slumbered over the wrong complained of. Such conduct creates a suspicion of insincerity and indifference, in the petitioner, and a presumption that by long acquiescence in the injury, the penalty has been remitted by an implied condonation. Full and satisfactory explanation of such delay, if not incidentally apparent, may be required by the Committee.

Notwithstanding that a long period (i. e., eight years) may have elapsed since the adultery, a petitioner is not guilty of "unreasonable delay" in presenting his petition, if he is prevented by poverty from taking earlier steps to obtain a divorce (*d*).

In Mr. Warr's case, the poverty of the petitioner was allowed to explain a lapse of more than ten years in applying for relief (*e*), and see the very singular circumstances of Dr. Lardner's case, (*f*) where the bill was not brought before the House till nine years after the admitted discovery, and nineteen after the fact of the wife's adultery; see also Capt. Wyndham's Divorce Bill, Sess. 1855 (*g*).

In Heavyside's case (*h*) several other cases of delay in bringing in a bill for divorce, are collected and referred to.

The taking of the opinion of Counsel as to the propriety of an application for a divorce has also been held to be a sufficient excuse for delay (*i*).

(*d*) *Ratcliff v. Ratcliff*, 1 S. and T. 473.

(*e*) Macqueen's H. L. Practice p. 666.

(*f*) *Ibid*, p. 664.

(*g*) 3 Macqueen's House of Lords Rep. 43.

(*h*) 12 Cl. and Fin. 333.

(*i*) *Tollmache v. Tollmache* 1 S. and T. 558.

**Desertion or Wilful Separation.**—On this point the divergence of the former Ecclesiastical Courts from the practice of the House of Lords was wide. There is no case in which an agreement to separate has been held by the former a bar to a suit for divorce by reason of adultery. If at one time there was a tendency to suppose it might have that effect, later cases are quite decided against it, though agreements were often pleaded as part of the history of the parties, and as leading to the probability of the charge made; neither was malicious desertion considered any excuse for adultery.

But the House of Lords refused to pass divorce bills where there were deeds and agreements of separation, unless peculiar circumstances were shown to warrant them. A Standing Order on bills of divorce (A.D. 1798) required the attendance of the petitioner in order to be examined whether at the time of the adultery, of which such petitioner complained, his wife was, by deed or otherwise by his consent, living separate and apart from him, and released by him, as far as in him lay, from her conjugal duty, or whether she was at the time of such adultery cohabiting with him and under the authority and protection of him as her husband.

In Lord Lismore's case (*j*) Lady Lismore's violence of manner and language towards her husband were held to justify the separation agreed upon, his conduct having been exemplary. In Sullivan's case (*k*), representations of his wife's misconduct were considered to account for a deed of separation. In two other cases (*l*) the grounds of separation were considered altogether frivolous and the bills refused. The principle seems to have been that an agreement to live separate almost amounted to leave and license, on the part of the petitioner, who had to show an adequate reason for such separation in the previous misconduct of the other party. The mere whim of both parties to live separate was no sufficient cause.

**Neglect.**—Another head mentioned is, such wilful neglect or misconduct as has conduced to the adultery. Several of the preceding circumstances may of course constitute neglect and mis-

(*j*) Macqueen's H. of L. Practice, p. 641.

(*k*) Ibid, p. 638.

(*l*) Ibid, p. 634 and 600.

conduct tending to the adultery of the other party, and all taken together will open a wide field for the discretion of the House.

In Simmon's case (*m*) where the husband had, without any reason, left the wife for seventeen years and found her no means of subsistence, the divorce was refused. In Bartelott's case, (*n*) upon consideration of a deed of separation, and upon proof of the introduction of improper society by the petitioner to his wife, as well as upon the general irregularity of his habits and conduct as a husband, the bill was rejected.

(7) **Intervention by the Minister of Justice.**—Until some cases occur calling for action under this portion of Rule O, it is difficult to indicate the character or mode of intervention and opposition to be offered by the Minister of Justice, but it is apprehended that it may probably be confined to cases on which a criminal prosecution may be founded, such as perjury, &c.

It seems proper, however, to present what has been said opening a broader view :—"In a certain sense the public "has an interest in every judicial controversy between "individual members of the community; hence it is, "that, for example, if a witness commits perjury in a mere "private suit, he is indictable, for it is an offence against the "public. But in a higher and different sense the public is interested in the marriages of the individual members of the community. They constitute the foundation, not only of social "order, but of society itself; and without them there would be no "legitimate population to support the state in its coming future. "Therefore, though unmarried persons may contract the *status* "of marriage when they mutually please, those who have assumed "it cannot cast it off by mutual consent, as parties to an ordinary "contract may annul its obligations. Hence, when an attempt "is made, through the courts, to undo a marriage, the public "becomes the party, not in the strict sense to oppose, but to see "that it does not prevail without sufficient and lawful cause existing in the real facts of the case; 'for,' in the words of a learned "English judge, 'society has an interest in the maintenance of

(*m*) 12 Cl. and Fin. 339.

(*n*) Macqueen's H. L. Practice p. 589.

“ ‘marriage ties, which the collusion or negligence of the parties  
 “ ‘cannot impair’ (o).

“ And from these views proceeds the doctrine, running  
 “ through all matrimonial suits, and bringing into subserviency all  
 “ other laws on the subject, that the divorce proceeding, though  
 “ upon its face a controversy between the parties of record only,  
 “ is, in fact, a triangular suit, *sui generis*, the Government or  
 “ public occupying the position of a third party, without counsel,  
 “ it being the duty of the Court to protect its interests” (p).  
 Another writer says : “ In this reason the Court will, of its own  
 “ motion, carefully scrutinize the evidence and call for any  
 “ explanation of any suspicious circumstances, and will take  
 “ notice of suggestions of uninterested parties who as *amici curiæ*  
 “ give information of collusion, etc” (q).

From the above extracts it will be sufficiently understood  
 that the provision in the last clause of Rule O is to indicate the  
 course to be followed by the Committee, when they have reason  
 to suspect improper appeals for relief, the object appearing to be  
 the prevention of fraud, &c. They will then hand the matter  
 over to the Queen’s Attorney to obtain evidence, if need be, and  
 to watch the proceeding, and they will thus be relieved of the  
 anomalous position of being, as it were, prosecutors and counsel.

There is a somewhat analogous provision in the English  
 Divorce Court Act (23 & 24 Vic., C. 144, S. 7,) by which the  
 Queen’s Proctor or any of the public may, before a decree for a  
 divorce becomes absolute, interfere upon *two grounds only*, viz :  
 (i) Collusion and (ii) Suppression of material facts. The inter-  
 vention is to defeat a *prima facie* but really dishonest case.  
 The Court can itself direct a case to be submitted by the Regis-  
 trar for the intervention of the Queen’s Proctor, and in cases of  
 collusion he must obtain the direction of the Attorney-General to  
 put forward collusion and also the leave of the Court to intervene.  
 He cannot intervene on information received pending suit until  
 it appears from the proceedings that the material questions within  
 his knowledge are not brought before the Court (r).

(o) Lord Penzance in *Hall v. Hall*,  
 3 Swab. and T. 347-349.

(p) Bishop on *Marriage and Di-  
 vorce*, 1873, Vol. II., section 230.

(q) Stewart on *Marriage and Di-  
 vorce*, 1884, section 327,

(r) In Scotland and in many of  
 the States of the American Union,  
 provision also exists for the public  
 prosecuting officer to intervene and  
 oppose suits for divorce.

## RULE P.

*Committee may hear Counsel for Either Party.—Parliamentary Solicitors.*

The applicant for divorce as well as the party from whom the divorce is sought may be heard before the Committee by Counsel learned in the law of the Bar of any Province in Canada.

The provisions of this Rule do not extend to Attorneys, Notaries or Parliamentary *Agents*.

The proceedings being of a judicial character and before a Committee from the highest tribunal in the land, Counsel are expected to appear in robes and otherwise properly apparelled.

The Select Committee and its members should be addressed as "Honorable Gentlemen."

It is not usual in Parliamentary procedure to hear more than two Counsel on each side.

Counsel should be supplied with a Brief and an Extra copy of the list of the authorities cited, to be handed in to the Chairman of the Committee if required.

**Parliamentary Solicitors.**—The services of a Parliamentary Solicitor at Ottawa are indispensable for the safe conduct of a bill of Divorce. He should be in attendance at the several meetings of the Select Committee at which steps in the case are taken.—first seeing that all papers or documents leading to proofs, and the petition and the bill are in proper form. An application of a simple character occupies fully six weeks in passing both Houses—during which period it receives three readings in each House, and is before Committees at least half a dozen times; on any one of these occasions important questions touching the case may unexpectedly present themselves, and end in the premature death of the Bill. It will, therefore, be readily seen, that a local Solicitor should be authorized to keep a general supervision over the case, and push it on from one stage to another. Neither the Senator or Member in charge of the Bill, nor the officers of Parliament, are under any obligation to speed it or to bring it to a successful issue. As in Courts of Law, a Solicitor



experienced in Parliamentary practice, can materially assist the Committee in securing compliance with the Forms and Procedure and in helping Counsel at the hearing of the evidence, to elicit the facts of a case and apply the legal principles bearing on it.

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### RULE Q.

*Applicant and Witnesses to be Examined on Oath or Affirmation—Rules of Evidence in respect of Indictable Offences to be Observed.*

The applicant for divorce, as well as the party from whom the divorce is sought, and all other witnesses produced before the Committee shall be examined upon oath, or upon affirmation in cases where witnesses are allowed by the law of Canada to affirm; and the Rules of Evidence in force in Canada in respect of indictable offences shall, subject to the provisions in these Rules, apply to proceedings before the said Committee, and shall be observed in all questions of fact.

Provided a quorum be present, any member of the Committee is authorized to administer the oath or affirmation to any witness examined upon oath upon matters relating to the bill (s). The usual practice has been, following that in the Scotch courts, for the Chairman to administer the oath.

The following is the form of oath of witness :

*The evidence you shall give on this examination shall be the truth, the whole truth, and nothing but the truth. So help you God.*—R.S.C., Cap. 11, Schedule Form A.

Form of affirmation :

*You do solemnly, sincerely and truly affirm and declare, that the evidence you shall give on this examination shall be the truth, the whole truth, and nothing but the truth.*—R. S. C., Cap. 11, Schedule Form B.

(s) Revised Statutes of Canada,  
1886, chap. 11, sec. 21.

As in ordinary courts of justice, the Reporter is always sworn, although there does not seem to be any express authority for it. His position is somewhat analagous to that of an Interpreter, who is always sworn in Criminal cases.

The following is the form of Stenographer's oath :

*You swear that you will truly and faithfully take down and transcribe the evidence to be given by the witnesses, who shall be examined in this matter. So help you God.*

Form of affirmation :

*You solemnly sincerely and truly affirm that you will truly and faithfully take down and transcribe the evidence to be given by the witnesses, who shall be examined in this matter.*

**The Rules of Evidence.**—In introducing the Rules to the House, Senator Gowan said, "There is, I take it, no binding rule as to what evidence should satisfy on a case of this kind ; but by analogy the ordinary broad rules of evidence would be acted on, though the proceeding is with a view to making a law ; for from the nature of the case, the enquiry is quasi-judicial. Moreover, in a certain sense, in case of adultery, there is *an offence* (against morality) on the part of the party complained against."

Following out the principle here hinted at, the adoption of the Rules of evidence in force in Canada in respect of Indictable offences, was most appropriate. The law of evidence in civil cases differs so much in the several provinces, that any attempt to be governed by it, must have led to the utmost confusion. The law of Evidence in criminal matters, as laid down in the Revised Statutes of Canada, 1886, chap. 174, is common to all the Provinces.

It has been said that a Parliamentary Committee is not to be bound down at every point by strict rules of legal evidence, and there are instances since Confederation which seem to favor this view. But it is a dangerous doctrine, although propounded on a memorable occasion by the great Burke, who argued that whatever rule of law stood in the way of substantial justice could not be binding on the House of Lords. "If," said he, "in the pursuit of such criminals, the Commons, who could have nothing in view but substantial justice, were to be stopped at every step by

objections drawn from technical rules, and the forms of pleading, then would the most dangerous criminals escape the vengeance of offended justice. Parliamentary impeachments which were the principal if not the only security of the constitution would be nugatory and vain."

Even in a Parliamentary impeachment, the contention found no favor, and the doctrine has ever since been recognized as dangerous and unsound.

It was clearly seen by the Senate, "that the proceeding by private bill for divorce, designed like other bills to attain its completion in an act of Parliament to a certain extent, bears some analogy to a suit in a Court of Justice," the primary operation of the particular law being upon the parties, and it is but just that facts upon which a divorce depends, should be established under known and safe principles, and so provision was made that Rules of Evidence in force all over the Dominion should be observed. Rule Q expressly requires that in the hearing and enquiry before the Committee, the Rules of Evidence in force in Canada respecting Indictable offences, should apply to proceedings and be observed in all questions of fact—that is—the truth or falsehood of the facts is to be ascertained by legal evidence on oath or affirmation administered to the witness before the Committee, and the enquiry conducted on principles that govern in criminal trials before a judge and jury; and so the Committee will exercise the functions both of judge and jury, determining, for example, the competency as well as the credibility of witnesses, the admissibility and relevancy as well as the sufficiency of evidence.

Edward Livingston, the great American jurist, speaking of *evidence* as a branch of jurisprudence gives the following definition—"Evidence is that which brings the mind to a just conviction of the truth or falsehood of any substantial proposition asserted or denied." The illustrations and developments of the different parts of this definition, the various kinds of legal evidence,—oral, written, presumptive and conclusive—are not within the scope of this work. These and such rules as result from the general adoption of the law of Evidence in Criminal cases will be found treated of at length in many works on Evidence, and it is believed there will be found no difficulty in their application—the matters

alleged and set forth in the preamble to a bill constituting the act of accusation (so to speak) and indicating the range and limit of evidence.

Some extracts from an admirable work, *Ram on Facts*, are given in the Appendix, which may be found of some assistance or, at least, suggestive in considering and finding upon facts in evidence for, of course, "*evidence* does not consist of merely swearing to the facts, but in *proof* of the facts by witnesses of undoubted credit."

Under Rules O and Q, the petitioner, as well as the party from whom the divorce is sought, are made competent witnesses, and herein lies the main difference between the Rule of Evidence here established and Sections 216 and 217 of the Revised Statutes, cap. 174.

Though the respondent does not appear, the petitioner must prove his case strictly in all necessary particulars, e. g., as to marriage, the identity of the parties and the charge upon which the bill is founded.

If a witness has been served with a summons, his attendance and giving evidence does not discharge him, he must be properly discharged by the Committee, before he is free to leave. As a rule, however, when the evidence of a witness is concluded for the time being, he will be ordered to withdraw and remain in further attendance if required (*t*).

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## RULE R.

### *Summons to Witness, &c—Service—Taxation of Expenses.*

Summonses for the attendance of witnesses and for the production of papers and documents before the Senate or the Select Committee on Divorce shall be under the hand and seal of the Speaker of the Senate, and may be issued at any time to the party applying for the same by the

(*t*) Bourinot's Parliamentary Practice, p. 204.

Clerk of the Senate (1). Such summonses shall be served, at the expense of the party applying therefor, by the Gentleman Usher of the Black Rod or by anyone authorized by him to make such service (2). The reasonable expenses of making such service and the reasonable expenses of every witness for attending in obedience to such summons shall be taxed by the Chairman of the Committee (3).

(1) Under the former practice summonses for witnesses could not be obtained until after the Select Committee had been appointed and organized, a system that led to some inconvenience, when a hostile witness at a distance from Ottawa had to be summoned.

The summonses are obtainable upon *praecipe*, and will no doubt be now issued in blank, signed by the Speaker—following the practice observed in courts of justice.

In the Martin case (1870) Notices to Produce and summons in a special form were used. See Form in Appendix.

(2) The summonses are to be served by the Usher of the Black Rod, but in practice he invariably authorizes any sheriff's officer or other competent person named by the Solicitor to make the service. A verbal authorization would seem sufficient, but a brief appointment in writing of one or more persons would be preferable.

(3). Persons who are summoned to appear before a committee of either House in cases of public enquiry are paid by the Clerk of either House, but no one who comes as a witness at the solicitation of parties interested in a private bill is paid by the House (u).

This Rule appears to give discretionary power to the Chairman of the Committee to fix the amount to be paid a witness for his time and expenses, and for the trouble of serving him if done by the Usher of the Black Rod or his deputy, and in determining the charges the chairman will no doubt be guided by the Tariff of the Superior Courts of Law.

(u) <sup>2</sup>Bourinot's Parliamentary Practice p. 458.

The disbursements set out after the manner of the ordinary affidavit of disbursements in an action at law, verified by a declaration, will be a convenient mode of bringing the matter before the Chairman.

Under the Tariff of the High Court of Justice, Ontario, the allowance is \$1 per diem to a witness residing within three miles of the Court House in which the action is tried, and \$1.25 per diem to a witness residing over three miles. The travelling expenses of a witness over three miles are allowed according to the sums reasonably and actually paid, but in no case in excess of 20 cents per mile one way. As a rule witnesses attend without a summons, and considering the liability of applications for divorce being rejected upon technical grounds or lost through delays in procedure, the prudent solicitor will not tie himself down strictly to the fees allowed by the Supreme Court Tariffs. He should calculate the fees and expenses according to the witness' station in life, and the circumstances under which he is placed, and the distance of his residence from the place of hearing (*v*).

Under the English parliamentary practice the authorized scale of fees permits the taxing officer to deal with witnesses on a somewhat equitable basis. Laborers, Police Constables and common Soldiers, are each allowed 5 shillings per diem for time, and 7 shillings per diem for hotel expenses if from home; while mechanics, tradesmen, farmers, innkeepers, clerks, &c., are each allowed from 7 shillings to 15 shillings per diem for time, and the like sums per diem for hotel expenses if from home (*w*).

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## RULE S.

### *Disobedience of Witness—Committal to Custody.*

In case any witness upon whom such summons has been served refuses to obey the same, such witness may by order of the Senate be taken into custody of the Gentleman Usher of the Black Rod,

(*v*) Webster's Parliamentary Costs, 1867, p. 168.

(*w*) Archbold's Q. B. Pract, 1879, p. 322.

and shall not be liberated from such custody except by order of the Senate and after payment of the expenses incurred.

This rule, of course, presumes that the witness has been paid or tendered his reasonable expenses, and that all has been done, necessary to put him into contempt.

The mode of enforcing process against a defaulting witness is cumbersome and involves delay which may prove extremely prejudicial to a case. The witness having disobeyed the summons, or having obeyed the summons who refuses to be sworn or to give evidence, a special report of the facts is made by the Committee to the House and an order is immediately made for his attendance before the House. If he should still refuse to obey, he may be ordered to be taken into the custody of the Black Rod and the Speaker directed to issue the warrant accordingly.

Any person refusing to obey any order of the House may be declared guilty of a contempt of the House and on being brought before it in custody he may be dealt with according to its will and pleasure (x). A witness refusing or neglecting to attend is liable to attachment (y).

In the Martin case, (1870), a witness refused to be sworn, and on being reported to the House was ordered to be taken into custody. In the interval between the Committee's report and the issue of the Order of the House, he left Ottawa for the United States. The Usher of the Black Rod subsequently reported that he could not find him. No further action was taken. The Order of the House directing a witness to be taken into custody becomes *effete* on the prorogation of Parliament.

"Payment of the expenses incurred" doubtless means those sustained by the House, such as those incurred by the Usher of the Black Rod or his deputy in executing his warrant, and the maintenance of the witness while in his custody. Possibly the witness may be also liable to an action of damages at the suit of the party grieved.

(x) Bourinot's Parl. Practice, p.  
104.

(y) Macqueen's H. L. Practice, p.  
527.

## RULE T.

*Provision for Cases not Provided for by the Rules.*

In cases not provided for by these Rules the general principles upon which the Imperial Parliament proceeds in dissolving marriage and the general principles of the rules, usages and forms of the House of Lords in respect of Bills for Divorce may be applied to Divorce Bills before the Senate and before the Select Committee on Divorce.

The procedure on Divorce has been pretty fully traced out by the Rules, but cases may arise presenting facts and considerations not covered in terms by these Rules. In cases not provided for, therefore, some known principles are properly referred to. The writer has somewhere seen the point put in this way—"all men not blinded by confidence or conceit, will naturally wish some record of what those distinguished for wisdom or experience have said or done in cases similar to those in which they themselves may be compelled to deliberate and act upon." Where the tribunal is one subject to appeal, it is of course bound by the decision of the tribunal which has appellate jurisdiction over it. This of course would not apply to the Parliament of Canada in respect to the decisions of the House of Lords or the English Court of Divorce which have no appellate jurisdiction over us. The point touching our position and duty seems fairly presented in a recent debate.

"In shaping action or legislation on a Bill of Divorce, upon facts in evidence before us, we naturally look to the House of Lords hoping for light, and to see what others have done in cases similar to those in which we are called upon to deliberate and act. But we have never bound ourselves to accept their decisions as authoritative and conclusive. We follow precedents where they commend themselves to our judgment, and we decline to follow them where they do not, and rightly so, for the decisions of the House of Lords on Bills of Divorce have not the weight that attaches to the regular legal tribunals. The majority determines, and in the minority of a vote may be found



“ men of learning, wisdom and experience, expressing opinions adverse to the determination, more in accordance with the eternal principles of truth and justice ” (z).

This view appears consistent with what is sound constitutionally and sound in morals ; and the Parliament of Canada may well be trusted in this, as in other matters, to shape its legislation in accordance with the best and highest interests of the community.

There is a somewhat similar provision in the Division Courts Act of Ontario, copied apparently from the Imperial Act, 9 & 10 Vic., Cap. 95, regulating the English County Courts. Josiah W. Smith, B.C.L., a learned judge of these Courts commenting on the provision remarked : “ It is an utter mistake to suppose that the judges of these Courts are bound to adhere to the mode of procedure or principles of practice in the Superior Courts . . . the portion of the section in force is, ‘ In any action not expressly provided for herein (that is in the Statute, 9 & 10 Vic.,) or by the said Rules the general principles of practice in the Superior Courts of Common Law, *may* be adopted and applied at the discretion of the judges to actions and proceedings in their several Courts,’ so that not only is the judge not bound by details of practice, but it is in his discretion whether he shall adopt even the general principles of practice in the Superior Courts.” He adds, “ I cannot allow the sacred cause of justice to be defeated by any attempt to import into these Courts, where the circumstances are so different, the mere technicalities of the Superior Tribunal.”

This Rule directs that in matters not provided for, “ the general principles upon which the Imperial Parliament proceeds in dissolving marriage and the general principles of the rules usages and forms of the House of Lords in respect of Bills for divorce ” *may* be applied to Divorce Bills before the Senate and before the Select Committee on Divorce. The provision is *permissive*, not imperative, and is confined to procedure before the Senate.

The English Court of Divorce was created by Statute and is

(z) Senator Gowan, Senate Debates, 1888, p. 625.

confined to certain cases, and can grant relief only under the circumstances and in the manner prescribed by the Act.

The subject of divorce comes *at large* to the Parliament of Canada. But as in the early history of the English Divorce Court, reference was had to former Parliamentary practice *as a subject of study* (a), so with us on the same principle, the proceedings of the House of Lords, or even those of the Divorce Court, if in the latter case, not based on mere positive enactment, form to us important objects of study. Moreover, to these, or to the old Ecclesiastical Courts we naturally look for the meaning assigned by long usage to technical terms, for instance—condonation, collusion or connivance or the like, and what would be proof of such. The sources mentioned, might in this connection, properly be resorted to, and the general principles to be deduced, well applied.

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### RULE U.

#### *Declarations to be Statutory and Subject to Provisions of Act.*

Declarations allowed or required in proof may be made under the Act of the Parliament of Canada entitled "*An Act respecting Extra-judicial Oaths*," before any Judge, Justice of the Peace, Public Notary, or other functionary authorized by law to administer an oath.

Prior to 1883, a practice had arisen of proving service of Notice by an affidavit sworn before a Commissioner for taking affidavits for use in the High Court of Justice. Senator Miller, (*Senate Debates*, 1883, pp. 58-63), in calling the attention of the House to the irregularity of the practice, pointed out that such affidavits were not entitled in any court, and that perjury could not be assigned thereon; also that as the Commissioner was limited by the authority of his commission to take affidavits for use in the High Court of Justice, he had no power to take an oath in a proceeding before the Senate.

(a) Fritchard on Divorce, p. 2.

This led to a change in the rule proving service by oath at the bar of the House, proof by statutory declaration being substituted.

The operative clause of the Statute, Revised Stat. of Can. (1886) Ch. 141, is as follows:—

“Any judge, justice of the peace, public notary, or other functionary authorized by law to administer an oath, may receive the solemn declaration of any person voluntarily making the same before him, in the form in the schedule to this Act, in attestation of the execution of any written deed or instrument, or allegations of fact, or of any account rendered in writing.”

#### SCHEDULE.

I, A. B., do solemnly declare that (*state the facts declared to*) and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the “Act respecting Extra-judicial Oaths.”

Care should be taken that the declaration is made before one of the persons named in the Act.

A Commissioner for taking affidavits for use in the High Court of Justice is not a functionary within the meaning of the Act, and a declaration made before him will not sustain a charge of misdemeanor under the Act (*b*).

With respect to some of these functionaries it is apprehended that the Committee may, with safety, follow the practice laid down in the Act respecting the Supreme and Exchequer Courts of Canada, as follows: “Every document purporting to have affixed, imprinted or subscribed thereon or thereto, the signature and official seal of any notary public or the signature of any judge and the seal of the Court, or the signature and official seal of any consul, acting consul, pro-consul or consular agent, in testimony of any oath, affidavit, affirmation or *declaration*, having been made by or before him, shall be admitted in evidence without proof of any such signature or seal, being the signature or signature and seal of the person whose signature or seal the same purport to be or of the official character of such person (*c*).

(*b*) Patterson J. A., *Regina v. Monnk*, Armour on Titles, 1887, p. 95.

(*c*) 39 Vic., cap. 26, sec. 13.

## RULE V.

*Other Rules Applicable to Proceedings under these Rules.*

Rules 72 to 84 both inclusive, are hereby rescinded; but all other Rules of the Senate which, by reasonable intendment, are applicable to proceedings in divorce, shall, except in so far as altered or modified by these Rules, or inconsistent therewith, continue to be applicable to such proceedings.

This Rule rescinds the Rules under which the former cumbersome and uncertain procedure was conducted.

Such Rules of procedure as fitly apply to divorce, as well as other matters of private bill legislation and not altered or modified by these Rules, still apply.

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RULE W.

The subjoined forms, varied to suit the circumstances of the case, or forms to the like effect, may be used in proceedings for divorce.

This is a not uncommon statutory provision. Under the Criminal Procedure Act (Revised Statutes of Canada, 1886, chap. 174, sec. 278), the forms in the Schedule of the Act, "or forms to the like effect," are to be good, valid and sufficient in law; and the forms are to serve as a guide to show the manner in which offences are to be charged, so as to avoid surplusage and verbiage, and the averment of matters not necessary to be proved, and the document founded on the form is to be held good if, in the opinion of the court, the party proceeded against sustains no injury from its being held to be so, and the offence intended to be charged by it, can be understood from it.

The Interpretation Act (Revised Statutes of Canada, 1886, cap. 1, sec. 44, is to the same effect substantially.

**Form A.***Referred to in Rules D. E. I. and J.*

## NOTICE OF APPLICATION FOR DIVORCE.

Notice is hereby given that (*name of applicant in full*) of the  
 of , in the county (*or district*) of  
 , in the Province of , (*here state the  
 addition or occupation, if any, of applicant*), will apply to the Par-  
 liament of Canada, at the next session thereof, for a Bill of  
 Divorce from his wife (*or her husband*), (*here state name in full,  
 residence or addition or occupation, if any, of the person from whom  
 the divorce is sought*), on the ground of (*adultery, adultery and  
 desertion, or as the case may be (d)*),

Dated at , } *Signature of applicant or solicitor*  
 Province of , } *for applicant.*  
 day of 188 , }

(*When any particular relief is to be applied for, the nature  
 thereof should be briefly indicated in the notice.*)

(*d*) *Or*, bigamy, *or* bigamy with adultery, *or*, that the said  
 was at the time of his marriage with the said  
 and has ever since been wholly unable to consummate the said  
 marriage by reason of his malformation ; *or*, by reason of his  
 frigidity and impotence.

**Form B.***Referred to Rules E. I. and J.*

## DECLARATION AS TO SERVICE OF NOTICE WHEN MADE PERSONALLY.

PROVINCE OF } I, A. B., of the of  
 COUNTY (*or district*) OF } in the county (*or district*) of , in  
 To Wit : } the Province of , (*occupation*) do  
 solemnly declare :—

1. That on the day of , A. D. 188 , I  
 personally served C. D. (*names of person served*) with a true copy  
 of the notice hereto attached and marked "A," by giving the said  
 copy to and leaving it with the said C. D. at (*state place of service.*)

2. That I know the said C. D. and that I believe him to be  
 the person described in the said notice as the husband of E. F.  
 therein named.

(*Add any statements made by C. D. to the person effecting the  
 service showing identity.*)

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the "*Act respecting Extra Judicial Oaths.*"

Declared before me at the \_\_\_\_\_ of \_\_\_\_\_  
 in the county of \_\_\_\_\_, in the \_\_\_\_\_  
 Province of \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_  
 A. D. 1888 .

*Signature of declarant.*

NOTE.—*Exhibits attached to the declaration should be verified under the hand of the public functionary before whom the declaration is made.*

It might be expedient to add to this, that "the Notice A is a copy of the notice as it appeared in the *Canada Gazette*," which can be readily seen by inspection and comparison (e).

Some circumstances should be stated showing identity, such as the fact that the Declarant has known Respondent for some years, or some admission by him that he is the Respondent mentioned in the notice.

A convenient mode of identification, frequently received by the Committee as sufficient, is by means of a photograph, which might be filed with the declaration of service.

In the recent cases of Gifford and Hewat, before the House of Lords in 1887, the parties were respectively identified by the witnesses called to prove adultery, by means of photographs.

### Form C.

*Referred to in Rules G. and K.*

#### GENERAL FORM OF PETITION.

To the Honorable the Senate of Canada in Parliament assembled.

The petition of A. B., of the \_\_\_\_\_ of \_\_\_\_\_,  
 in the County of \_\_\_\_\_, in the Province of \_\_\_\_\_, the  
 lawful wife of C. D. of, etc., (*state names in full, residence and occupation*).

HUMBLY SHEWETH:—

1. That on or about the \_\_\_\_\_ day of \_\_\_\_\_,  
 A. D. 18\_\_\_\_, your petitioner, then A. X. (*spinster, or as the case may be*), was lawfully married to the said C. D. at \_\_\_\_\_

(e) Cox case, Senate Debates,  
 1885, p. 26.

2. That the said marriage was by license duly obtained (*or, as the case may be*) and was celebrated by

3. That at the time of the said marriage your petitioner and the said C. D. were domiciled in Canada, and have ever since continued to be and are now domiciled in Canada.

*(All facts as to the residence and domicile of the parties at and since their marriage should be stated with particularity.)*

4. That after her said marriage your petitioner lived and cohabited with her said husband at \_\_\_\_\_ ,  
and that there are now living issue of the said marriage  
children, viz.: Mary D., born the \_\_\_\_\_ day of \_\_\_\_\_ ,  
18 \_\_\_\_\_ , and Elizabeth D., born the \_\_\_\_\_ day of \_\_\_\_\_ ,  
18 \_\_\_\_\_ .

5. That (*f*) on or about the \_\_\_\_\_ day of \_\_\_\_\_ ,  
A. D. 18 \_\_\_\_\_ , at the \_\_\_\_\_ in the \_\_\_\_\_ , the  
said C. D. committed adultery with one G. H.  
of \_\_\_\_\_ , spinster, and since then on divers occasions  
has committed adultery with the said G. H.

6. That your petitioner ever since she discovered her said husband had committed the said adultery has lived separate and apart from him and the said C. D. has not since cohabited with your petitioner.

7. That your petitioner has not in any way condoned the adultery committed by the said C. D., and that no collusion or connivance exists between her and the said C. D. to obtain a dissolution of their said marriage.

Your petitioner therefore humbly prays :—

That your Honorable House will be pleased to pass an Act dissolving the said marriage between your petitioner and the said C. D. and enabling your petitioner to marry again, and giving to your petitioner the custody of the said Mary D. and Elizabeth D. and granting your petitioner such further and other relief in the premises as to your Honorable House may seem meet.

And as in duty bound your petitioner will ever pray.

*Signature of Petitioner.*

(*f*) Naked facts, not matters of evidence, should be inserted in the petition.

## Form D.

*Referred to in Rules E. F. G. H. I. J. K.*

## DECLARATION VERIFYING PETITION.

PROVINCE OF \_\_\_\_\_ } I, A. B., of the \_\_\_\_\_ of \_\_\_\_\_,  
COUNTY (or District) OF \_\_\_\_\_ } in the County of \_\_\_\_\_, in the Province  
TO WIT.: \_\_\_\_\_ } of \_\_\_\_\_, (occupation, if any. In  
the case of the wife being the applicant, say "wife of C. D." and  
give names, residence and occupation or addition of the husband), the  
petitioner in the foregoing petition named, do solemnly declare :—

1. That, to the best of my knowledge and belief, the allegations contained in the paragraphs of the foregoing petition, numbered respectively \_\_\_\_\_, are, and each of them is, true.

2. (If any matter is alleged, of which the petitioner has not personal knowledge, add "That, with respect to the matters alleged in the paragraphs of the foregoing petition, numbered respectively \_\_\_\_\_, I am credibly informed and believe them, and each of them, to be true.")

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the "*An Act respecting Extra-Judicial Oaths.*"

Declared before me, at the \_\_\_\_\_ of \_\_\_\_\_ } (Signature of Declarant).  
\_\_\_\_\_, in the County of \_\_\_\_\_, }  
in the Province of \_\_\_\_\_, }  
day of \_\_\_\_\_, A.D. 188 \_\_\_\_\_, }



## CHAPTER IX.

### PROCEDURE ON DIVORCE BILLS IN THE HOUSE OF COMMONS.

THE foregoing Senate Rules of Procedure do not extend to the House of Commons, and that House not having adopted any Special Rules of its own for the guidance of applicants for Divorce Bills, these Bills are subject to the rules and practice respecting ordinary Private bills. As each case receives a full and searching examination in the Senate, it is considered there is no necessity for an equally strict investigation in the Commons.

Proceedings are commenced under Commons Rule No. 51, by advertizing a notice of application in the *Canada Gazette* and in two local newspapers. The form of notice should be similar to the notice required by the Senate Rule D (a) and the practice is to make the publication of the notice for the Senate serve for that of the Commons with this difference, that the notice for the latter be published for "two months during the interval of time between the close of the preceding session and the consideration of the petition," as required by said Rule 51. Copies of the newspapers containing the first and last insertions of such notice are to be sent to the Clerk of the House of Commons to be fyled in the Standing Orders Committee Room.

There is no Rule of the Commons requiring service of the notice on respondent.

The fee to Parliament being paid in the Senate, the House in which the Bill originates, no further fee is payable in the Commons.

A petition similar in form to that presented in the Senate (b) but addressed *To the Honourable the House of Commons in Parliament assembled*, signed by the Applicant should be handed to a member of the Commons for presentation in the House within the first two weeks of the session (c).

(a) See Ante, page 83.

(b) Ibid, page 137.

(c) Commons Rule 49

The petition in the first place, being read within the time limited, goes without order to the Committee on Standing Orders to report upon the due publication of the Notices for the two months, and to see that the petition does not ask for more relief than the Notice of application includes.

Upon a favorable report from the Committee on Standing Orders, no further action is taken until the Bill is sent from the Senate.

When the Bill with a copy of the evidence, known as "the blue paper copy," comes down from that House, the former is read a first time in the Commons, and is then placed on the Order Paper for a Second reading, after which the Bill with the evidence is referred to the Private Bills Committee for consideration (*d*). One copy of the evidence is also sent to each member of the House.

In that Committee a discussion frequently takes place on the evidence, and if the Bill passes through the Committee, the Chairman reports it to the House without amendment.

The report being adopted, the Bill is placed upon the Order Paper of the day following the reception of the report for consideration in Committee of the Whole. The House at the proper time resolves itself into Committee on the Bill, and after rising and reporting, the amendments made in Committee of the Whole (if any) are considered, and then the Bill is read a third time and passed.

The Second Reading in the Commons is invariably a critical stage, because it is the occasion upon which the Members who are opposed to divorce upon religious grounds, call for the *yeas* and *nays*.

The third reading is the final stage in both Houses, unless in the case of a Bill coming back from the other House with amendments, and the latter have to be considered. A Member may move the rejection of the Bill at any reading, and should the

(*d*) It is within the competency of the House of Commons to refer Divorce Bills to a Committee for the purpose of making *quasi*-judicial investigation, but the Private Bills Committee contents itself with per-

using the evidence sent down by the Senate, as taken by a Select Committee from that House —Commons Debates, 1877, p. 811.—Hon. Edward Blake.

Solicitor find that there is any likelihood of a hostile motion, he should take such steps for its safety as will occur to one familiar with Parliamentary practice.

No alteration whatever can be made in any Bill after it has passed the last stage prior to its receiving the Royal Assent.

**Royal Assent.**—The final act in the passage of a private bill is obtaining the Royal Assent. The Parliamentary Solicitor attends to the necessary details of this.

## CHAPTER X.

### OUTLINE OF THE PROCEDURE ON A BILL OF DIVORCE

FOR the convenience of the Legislators and legal practitioners before Parliament, an attempt is here made to summarize briefly the practice to be followed in prosecuting an application for a Bill of Divorce.

Having determined whether the case is one that will come within the general principles put forward in Chapter V (*a*), the first step is the advertising of the Notice of application for a period of six months, and in accordance with the directions laid down in Rule D—See notes thereto, *pages* 83-5.

The Notice having been duly advertised, the next active duty in connection with the Bill, arises in connection with the service of what may be termed the personal Notice as required by Rule E. The object of the notice is to ensure that no person's rights shall be affected without calling his or her attention to the proceeding, and giving the opportunity of protection by opposition to the proposed Bill. The Notice is to be served at least thirty days before the presentation of the petition, and in the manner prescribed by Rule E. Rule H is to be complied with eight days before the House meets.

By the Senate Rule 57, "All Private Bills are introduced on Petition, &c." As to the Petition see Rule C and notes appended, and Form C, *ante*.

Matters being thus far matured, the Petition accompanied by the material mentioned in Rule I, may be presented by a Senator on any day when the House sits, and it then goes without order to the Select Committee.

After examination by the Committee (*b*) at their next meet-

(*a*) Ante p. 47.

(*b*) The proceedings before the Select Committee prior to the sitting

to hear the evidence, are attended by the Solicitors. Counsel are not retained at these stages.

ing, the Committee report to the House, and upon the adoption of the report, if it be favorable to the application, the Bill is then introduced and read a first time under Rule K, and a date, not less than fourteen days thereafter is fixed for the Second Reading. Rule L provides for the service of the Notice thereof and the copy of the Bill on the Respondent.

The interval between the first and second readings of the Bill will also be occupied in the general preparation of the case on the merits ; in advising with Counsel ; in arranging for the attendance of the petitioner and the witnesses if they will attend without summons, and in taking down and arranging the evidence by which the case is to be supported.

When books or papers are sought to be produced the Speaker will grant a summons for that purpose upon application made through the Clerk of the Committee.

When the Select Committee assembles under the provisions of Rule M to hear the evidence, the Bill is formally called on by the Committee Clerk. The Chairman asks the Counsel present for whom they respectively appear. If the Respondent is unrepresented, the crier or doorkeeper is instructed to summon him in a loud voice in the passages. The Stenographer is then sworn. When these and other preliminaries are completed the Petitioner's case is opened by his Counsel. This is confined to a recital of the facts intended to be proved.

Having closed his opening address to the Committee, Counsel proceeds to call his witnesses, and to prove the preamble of the Bill step by step. It lies with him to decide what amount of evidence is necessary to establish the preamble. Hints are often dropped by the Committee which show that they have had enough of a certain class of evidence, and questions asked from time to time indicate the matters upon which they desire further information.

The Petitioner should be examined in accordance with the Notice of the Second Reading, and as to collusion, connivance or condonation—*See Rule O.*

It may happen that the Petitioner cannot attend upon the examination. In such case, if the evidence in other respects be satisfactory, the Committee may dispense with his attendance, but

we have no Canadian precedents for this. There are, however, English precedents where the petitioner was residing in a foreign country and could not comply with the order (c).

In addition to cross-examining the witnesses for the Petitioner, Respondent's Counsel may produce evidence to substantiate any or all the defences that may be raised to all applications as provided by Rule O. When this is done, Petitioner's Counsel cross-examines the witness in the usual way. The procedure is somewhat defective in not making some provision for *Notice* to be given Petitioner of the character of the defence intended to be relied upon, so that he might be able at the same time to adduce evidence in rebuttal. Parties are invariably allowed reasonable adjournments of the hearing to enable them to procure such evidence as they may deem necessary.

During progress of the case the Chairman of the Committee may direct the room to be cleared of all parties present except the Committee for the purpose of deliberating on any point raised by Counsel.

After the conclusion of the evidence, the Counsel for the Respondent addresses the Committee and comments upon the matters which have been given in evidence. Petitioner's Counsel then closes for his side.

On the conclusion of the addresses of Counsel, the Chairman of the Committee directs the room to be cleared, and all present, except the Committee, retire.

After deliberation the parties are re-called and the Committee announce their finding. If they approve of the bill they declare the preamble of the bill *proven*, and *not proven* when their decision is against the Petitioner.

In case the Committee report against the prosecution of the Bill it is usual to return all vouchers and exhibits to the respective parties (d).

When the Committee have declared the preamble of the bill proven, the next matter taken up is that of clauses, which are considered and adopted one by one—See Rules M & N. The proceedings then terminate and the Committee have nothing further to do. The bill is reported to the House by the Chairman of the

(c) Macqueen's House of Lords Practice, p. 530.

(d) Senate Journals, 1882, p. 170-1.

Committee, and all further proceedings take place in the House itself. There is no further reference to the Committee, unless in the case of a bill being re-committed, which is not a very frequent occurrence.

The Senator in charge moves that the report and evidence be printed and taken into consideration with the Bill on a future day.

On the day appointed, the Senator in charge moves the adoption of the report and after debate, it is generally adopted on a division. The third reading and passing of the bill usually follow immediately thereafter, also on a division.

The third reading of a bill after the adoption of a report by the Senate is not another stage of the bill, and it may therefore be proceeded with immediately after (e).

In the Morrison case, although the evidence had only been distributed an hour previous, the House adopted the Report and the bill was immediately read a third time and passed (f).

It is next moved that a message be sent to the House of Commons to communicate the evidence and documents, and to request their return to the Senate.

In the Commons the procedure is simpler and is as briefly set forth in the last chapter (g) as circumstances will admit. The Bill should be as carefully watched and followed up in this House as in the Senate by the Parliamentary solicitor, and he should be fully prepared to give the Private Bills Committee, any information that may be asked, or to supply evidence on any point omitted or overlooked by the Select Committee on Divorce from the Senate.

The Bill having passed the House of Commons, it is sent back to the Senate, and if there are no amendments to be concurred in, it receives the Royal Assent at the closing of Parliament.

(e) Senate Debates, 1888, Speaker Allan in *Tudor-Hart case*, p. 697.

(f) Senate Debates, 1888 p. 698.  
(g) Ante, p. 141.

## CHAPTER XI.

### EFFECTS OF DIVORCE AS TO RE-MARRIAGE AND AS TO PROPERTY.

**Re-marriage.**—"Parliamentary Bills of Divorce," says Shelford, "usually declare that the bond of matrimony between the parties shall be wholly dissolved, annulled, vacated, and made void to all intents and purposes whatsoever. But express authority to contract a new marriage is given only to the injured party, making it lawful for such party to marry again, and declaring that the children born in such matrimony shall be legitimate. There is no similar provision for the future marriage of the offending party. It seems more than probable, that, in the early instances of these divorces, it was not supposed or adverted to, that the permission to contract a new marriage could extend to the adulteress. But the subsequent and long acquiescence seems to have established such marriages, or at least entitled them to be established, if any doubt should arise respecting their validity. It is indeed difficult to understand how a marriage can be dissolved as to one of the parties, without being equally dissolved as to the other. And perhaps, it may be concluded, that divorce bills, as now worded, though purporting only to relieve the injured party, are a complete dissolution of the marriage; of which dissolution the adulteress may legally avail herself, unless expressly prohibited by the same act of the legislature. This point was much discussed in the House of Lords in the year 1800, and although the preponderating opinion seemed to be in favor of the validity of the marriage between the guilty parties, yet some of the speakers entertained doubts on the subject" (a).

By the English Divorce Court Act, it is enacted that when the divorce has become irreversible, "it shall be lawful for the *respective parties* to marry again as if the prior marriage had been dissolved by death."

(a) Shelford, Marriage and Divorce,  
p. 476.



In Canada all the Acts passed contain a clause declaring that the Petitioner shall be at liberty to marry again, but they contain no reference to the Respondent. As the first enacting clause of the bill dissolves the marriage, the logical and natural consequence is, that both parties are restored to the same condition they were in before the marriage took place.

**As to Property.**—The practice of the English Parliament on private bills of divorce was to declare that the husband should have no claim on the divorced wife's *after acquired* property, leaving him to retain all such property of his wife's as passed to him absolutely *jure mariti*.

The changes in the law respecting the property of Married Women have so practically constituted a married woman a *feme sole* in Ontario, Manitoba and the North-west Territories at least, that little difficulty can now arise as to the disposal of the property of the wife on a dissolution of her marriage.

**Name to be borne by wife after divorce.**—It appears to be a matter of doubt whether a wife after divorce should retain the name of her divorced husband, or whether she ought to resume her maiden or other former surname. When a sentence of nullity of marriage has been pronounced, it is clear that the so-called wife ought to resume her maiden or former surname, for there has, in fact, been no marriage, and the children, if any, are *ipso facto* illegitimate. In cases of dissolution of marriage, however, where there are children, and especially if some of them are committed to the care of the mother, it seems reasonable and proper that she should not cease to use her husband's name. But where there are no children, the resumption of her maiden name is supported by precedent, and would seem to be unobjectionable, the marriage having been annihilated, and the connection at an end (*b*).

(*b*) Hammick's Marriage Law of England, p. 30; Macqueen's Law of Divorce (2nd ed.), p. 112. A wife having obtained a decree dissolving her marriage with her husband, subsequently remarried him, after banns in which she was described by her name of marriage, she having between the decree dissolving her first marriage and the celebration of the second, usually passed by her maiden

name. On an application to annul the second marriage by reason of undue publication of banns—*held*, that the name acquired by marriage can only be superseded by a reputed name in cases where the name has been so far acquired by repute as to obliterate the name acquired by marriage. *Fendall or Goldsmid v. Goldsmid*, 46 L. J., p. 70.

## TABULAR STATEMENT

showing Divorce *Bills* presented to the Senate of Canada, names of petitioners and causes of application, also the Divorce *Acts* passed by the Parliament of Canada, the whole from 1867 to 1888, both years included.

NOTE.—All the Divorce *Acts* passed during the above mentioned period received the Royal Assent and became law.

YEAR.	Bills introduced in the Senate.	Bills Passed by Senate and sent to H. of C.	Bills Passed by H. of C. and became law.	NAME OF PETITIONER.	GROUND OF DIVORCE ACT OR PETITION.	REMARKS.
1867	1	1	1	J. F. Whiteaves . . .	Adultery	Petition & Preamble not sufficiently specific. Marriage of a minor without father's consent
1868						
1869				G. W. Jones . . . . .	Adultery . . . . .	
1869	1	1	1	J. H. Stevenson . . .	Adultery . . . . .	Preamble not proved.
1870	1	1	1	J. R. Martin . . . . .	Adultery . . . . .	Passed Com. in H. of C. then received 3 mos. hoist.
1871	1	1	1	No Bill presented		
1872	1	1	1	J. R. Martin . . . . .	Adultery . . . . .	Preamble not proved. Respondent's petition referred, &c
1873	1	1	1	J. R. Martin . . . . .	Adultery . . . . .	Bill of 1876 taken up afresh on Respondent's behalf, and new clause substituted to grant her relief.
1874	1	1	1	None.	None.	
1875	1	1	1	H. W. Peterson . . .	Adultery . . . . .	
1876	1	1	1	R. Campbell . . . . .	Adultery . . . . .	
1877	1	1	1	R. Campbell . . . . .		
1877	1	1	1	Mary J. Bates . . . .	Adultery and Bigamy.	
1877	1	1	1	Walter Scott . . . . .	Adultery . . . . .	
1877	1	1	1	M. J. H. Holliwell .	Adultery, cruelty, neglect to support and bigamy.	
1878	1	1	1	Eliza M. Campbell .	Desertion, cruelty, etc.	
1878	1	1	1	Hugh Hunter . . . . .	Adultery . . . . .	Petition only—No Bill presented.
1878	1	1	1	Victoria E. Lyon . .	Adultery, disease and desertion.	
1878	1	1	1	G. F. Johnston . . . .	Adultery . . . . .	

## TABULAR STATEMENT.—(Continued.)

YEAR.	Bills introduced in the Senate.	Bills Passed by Senate and sent to H. of C.	Bills Passed by H. of C. and become law.	NAME OF PETITIONER.	GROUND OF DIVORCE ACT OR PETITION.	REMARKS.
1879	I	I	I	Eliza M. Campbell.	Desertion, cruelty, etc.	Separation from bed and board and provision as to children, property, etc.
1880	.....	.....	.....	None.		
1880	.....	.....	.....	None.		
1881	I	.....	.....	M. Gardiner .....	Adultery .....	Bill abandoned after an order to produce further evidence.
1883	I	.....	.....	P. Nicholson .....	Adultery .....	Preamble not proved.
1884	I	I	I	John Graham .....	Adultery .....	
1885	I	.....	.....	Chas. Smith .....	Adultery .....	
1885	I	I	I	Fairy E. J. Terry..	Adultery, cruelty and desertion	Collusion, connivance & consent reported.*
1885	I	I	I	A. E. Davis .....	Adultery, cruelty and desertion.	
1885	I	I	I	G. L. E. Hatzfield.	Adultery	
1885	I	I	I	Alice E. Evans....	Adultery and desertion.	Desertion apparently but not specifically so alleged.
1885	I	I	I	G. B. Cox .....	Adultery	
1886	I	I	I	Flora Birrell .....	Adultery .....	
1887	I	I	I	Susan Ash .....	Adultery, but not specifically alleged.	Marriage annulled <i>ab initio</i> .
1887	I	I	I	W. A. Lavell .....	Nullity of Marriage.	
1887	I	I	I	John Monteith ...	Adultery	
1887	I	I	I	Marie L. Noel ....	Adultery and desertion.	Rejected, preamble not proved.
1887	I	I	I	Fanny L. Riddell..	Adultery and desertion.	
1888	I	.....	.....	Mary M. White...	Impotency .....	
1888	I	I	I	Andrew M. Irving.	Adultery	Postponed to next Session.
1888	I	I	I	Catherine Morrison.	Adultery and bigamy.	
1888	I	.....	.....	W. H. Middleton..	Adultery .....	
1888	I	I	I	Eleonora Tudor Hart	Adultery	

SUMMARY OF THE SEVERAL APPLICATIONS FOR BILLS OF  
DIVORCE MADE TO THE PARLIAMENT OF CANADA  
SINCE 1867, INCLUDING THOSE WHICH  
ULTIMATELY BECAME LAW.

The following notes profess to give only a general summary of what appear to have been the more prominent characteristics of each case ; leaving the reader who is in search of more copious and specific information to follow up the references by an inspection of the Journals and Debates of both Houses of Parliament. Some of the cases are parallel, presenting no distinguishing features, and might well have been omitted, but as the total number of applications is extremely limited the author believes the summarizing of the whole of them will prove useful as well as interesting.

## J. F. WHITEAVES' CASE, SESSION 1867-8.

*Adultery of the Wife.—Verdict in action by Husband for Separation as to Bed and Board.—Marriage Settlement annulled.—Bill passed.*

The preamble of this bill sets out that petitioner intermarried with Julia W., on 18th June, 1863; and that the parties cohabited together till 7th March, 1866, when petitioner discovered she had committed adultery with a person named in the evidence within a year preceding that date; that she thereupon left petitioner's house and continued to live apart from him; that petitioner had taken measures to establish her guilt judicially, and was then ready to prove the allegations of his petition. Subsequent to the presentation of the petition, petitioner secured a judgment against her in an action in the Superior Court, Montreal, for a Separation as to bed and board on the ground of the adultery therein proved.

In this case the Select Committee apparently did not examine any witnesses, but appear to have relied upon the exemplification of the proceedings in the action for Separation and the depositions of the witnesses examined in that cause.

The first enacting clause, besides annulling the marriage, annulled and declared void the Notarial marriage contract executed between the parties. The Bill passed.

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## G. W. JONES' CASE, SESSION 1869.

*Circumstances upon which Divorce asked not sufficiently set out in the Petition and Preamble.—Bill rejected by the Senate.*

June 9th, 1869.—The Committee reported, "That having heard the petitioner and respondent his wife, by Counsel, and having heard the several witnesses produced by the petitioner, and considered their evidence and the other testimony adduced by him, they are of opinion that the party from whom the divorce is sought, should have some specific information given to her as to the criminal intercourse with which she is charged as will enable

her to prepare for her defence, and they are of opinion that the petition and preamble of the Bill referred to them, which embody all the information communicated to the respondent in this case, do not sufficiently set forth the circumstances under which such divorce should be granted, particularly in not stating any place at, or even any period within which the alleged criminal intercourse took place, thus exposing the whole married life of the respondent to attack, and rendering it almost impossible for her to be prepared with exculpatory evidence."

This Report was adopted and the Bill rejected.

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#### J. H. STEVENSON'S CASE, SESSION 1869.

*Marriage of Minor without father's consent.—Immediate separation after ceremony and non-consummation of Marriage by cohabitation.—Subsequent Marriage of Respondent.—No Action of Damages.—Action and Verdict against Bondsmen named in Marriage License Bond.—Bill passed.*

Petitioner married Mary E. Foote, 22nd November, 1860, according to the rites of Wesleyan Methodist Church in Canada. He was then a minor in his seventeenth year, and was inveigled into the marriage, not knowing fully the effect and importance of the same; the marriage was by license and performed without the knowledge or consent and contrary to the wish of petitioner's father, who, when he afterwards became acquainted with the facts made every endeavor to prevent same but the ceremony had been performed before he had an opportunity to interfere. The parties were separated immediately after the marriage ceremony, and the marriage was never consummated by cohabitation. Subsequently, in 1864, the said Mary E. Foote, married in New York one Perry with whom she lived as his wife in California and bore him a child. Petitioner did not prosecute an action at law against Perry, because the cause of action arose, and Perry resided, beyond the jurisdiction of any Court in Ontario. An action was, however, commenced in the name of Her Majesty

the Queen by a writ of *scire facias* against the bondsmen, (a) on the bond upon which the marriage license was issued and by authority of which the marriage was celebrated, and a judgment was obtained for the bond debt, the effect of the judgment being to declare that such marriage was not illegal and void notwithstanding the infancy of the petitioner and the absence of consent on the part of his father. The preamble then charged that the said Mary E. Foote, by her so called marriage with Perry and by her adulterous intercourse with him had dissolved the bond of matrimony with petitioner. The Bill passed.

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J. R. MARTIN'S CASE, SESSIONS 1870-2-3.

1870.—*Application by husband for Bill on ground of adultery of the wife.—No evidence of adultery except judgment in action of Crim. Con.—Bill rejected by the Senate.* 1872.—*Application renewed and evidence of adultery given—Bill passed by Senate but rejected in Commons.* 1873.—*Application renewed—The Bill passed.—The adulterer being subpoenaed as a witness for Petitioner attended before the Committee, but refused to be sworn.—Reported to the Senate.—Motion and issue of Speaker's Warrant for his arrest.—Return of Warrant.*

1870. The record of the evidence is not printed in the Journals of the House for this year, but a reference to the original records shews that no evidence of adultery was adduced before the Committee. The Petitioner having obtained a verdict in an action of *Crim. Con.* against the adulterer, an exemplification of the judgment was put in evidence, his Counsel apparently relying upon it as sufficient to establish the charge of *adultery*. Several witnesses were examined and letters of the guilty parties were produced, and the Counsel for the respective parties in the *Crim. Con.* action also attended and gave evidence as to the result of that trial. The Committee reported the preamble "not proven." With respect to the letters produced it should be stated that they did not include all those produced in the action of *Crim. Con.* The letters

(a) *Regina v. Roblin*, 21 U. C. Q.  
B. R. 352.

used in that action had been returned to the respective Counsel at its conclusion, and only a limited number of them were produced before the Committee.

In 1872 the application was renewed and the Committee recalled most of the witnesses, and the somewhat unusual, if not improper, course of reading over and confirming their evidence as given at the examination in the previous session, was adopted. Additional evidence from a servant woman who conclusively proved the adultery was also received. On the Motion to adopt the Report of the Committee being made, a petition was presented from the Respondent praying that time be granted her to adduce evidence against the testimony of this woman and other witnesses, but the House promptly ignored the request by forthwith adopting the Report, and subsequently passed the Bill.

In the Commons the Bill was lost on a vote of 67 to 61, no special reason being urged for the rejection.

In 1873, the like objectionable course was taken, the evidence offered to the Committee being that taken and reported to the House in 1872, with the addition that the petitioner and only one of the witnesses were re-examined. The Bill passed both Houses.

The alleged adulterer was subpoenaed to give evidence in 1870, but did not obey the summons. The Committee took no action. In 1872, being again subpoenaed, he appeared before the Committee but refused to be sworn or to take the oath put to him by the Chairman of the Committee upon the following grounds : (1). That he occupied the position of a co-respondent and was not therefore compellable to be sworn or examined as a witness. (2). That according to the provisions of the Act of the Local Legislature of Ontario, 33 Vic. cap. 13, he was protected from being sworn as a witness in this case ; the Act providing that in any proceeding for adultery, no person is compellable to be sworn as a witness when his evidence would tend to subject him either to criminal proceedings or to a penalty, and that he, having been summoned as a witness for the same petitioner on a similar bill in 1870, and having failed to attend was liable to the penalty of having to pay the damages thereby caused to the petitioner.

The Committee decided that he was not protected by the Act referred to by him, and that the penalty would not follow.



A motion was then adopted in the Senate that the witness had been guilty of a breach of the privileges of the House for which he was directed to be taken into the custody of the Gentleman Usher of the Black Rod, and a Speaker's Warrant was issued accordingly. A week later the Gentleman Usher made a return of his inability to arrest the witness, owing to his not finding him.

This appears to be the only divorce case in which a witness in contempt has been proceeded against by order of the House.

As a matter of interest, the writer concludes this case with a copy of the objections and authorities handed in to the Committee by the respective Counsel at the conclusion of the petitioner's case in 1870, as follows :—

Counsel for Respondent submits that the petitioner has not made out such a case as calls on the Respondent to enter into a defence.

(1). That there is no evidence of the Respondent having been guilty of adultery.

(2). That the fact of the Petitioner's having allowed his wife to remain in his house and to appear on terms of affection with her and to bring her to his brother's house after the alleged discovery of her misconduct are circumstances *prima facie* indicating condonation. *Miller's Case*, Macqueen's P. H. L. 628; *Worrall's Case*, Macqueen's P. H. L. 630.

(3). That in the Petitioner's conduct there was evidence of negligence and inattention and other suspicious and unsatisfactory circumstances, and that his conduct as a husband was deficient in necessary caution and circumspection. *Copes Case*, Macqueen P.H.L. 593; *Perry's Case*, Macqueen P.H.L. 663; *Dundas' Case*, Macqueen P.H.L. 500, 509; *Miller's Case*, Macqueen P.H.L. 628.

(4). That there is no satisfactory explanation why the Petitioner has not levied the amount of the alleged judgment against the adulterer for alleged criminal conversation with his wife, and that the evidence adduced by the Petitioner implies collusion between Petitioner and adulterer, as no evidence was taken in that case and the verdict of the jury was by consent of Petitioner and the adulterer, and taking the transaction as detailed in the evidence adduced by the Petitioner it was substantially a contract between them; that day and time of payment of pretended damages had been granted and given by Petitioner to said adulterer for a period not yet expired. Macqueen P.H.L. 492, 493; *Taafé's Case*, Macqueen P.H.L. 624; *Howell's Case*, Macqueen P.H.L. 651; *Mildmay's Case*, Macqueen P.H.L. 651; *George's Case*, Macqueen P.H.L. 661.

(5). That the adulterer, who, according to Petitioner's evidence, resides within the jurisdiction of the Court, is not only likely, but must *ex necessitate rei* be possessed of positive evidence of the alleged adultery of the Respondent if committed, and as the Petitioner did not produce him as a witness before the Committee but pretended to subpoena him at a time when Petitioner knew he could not compel his attendance, all going to prove collusion—the prayer of his petition cannot be granted. Macqueen P.H.L. 535, 631, 632.

(6). The alleged judgment for *Crim. Con.* is not admissible as evidence. Macqueen P.H.L. 488, 500.

(7). The Bill for the relief of John Robert Martin does not make any provision for Mrs. Martin's support. Macqueen P.H.L. 537, 538.

(8). The said Bill does not bar nor exclude the Petitioner from all right and title in respect of the future property or estate, real, personal or mixed, that may be afterwards acquired by the Respondent. Macqueen P.H.L. 508.

Counsel for Petitioner submits that he has made out a case as calls on the Respondent to enter into a defence.

(1). That there is evidence of the Respondent being guilty of adultery, amply sufficient to convince the Committee and Senate that the act has been consummated :

(a). Confessions and admissions of Respondent

(b). Letters of adulterer to Respondent found in her possession.

(c). Circumstances leading by fair inference to the fact of adultery.

Macqueen 535, 537 ; Shelford 405, 415 ; Poynter 187, 198 ; Bishop 421, 453 ; Macqueen (Ed. 1860) 213 ; Taylor on Evidence 661.

(2). That there is not the slightest evidence of any condonation on the part of the Petitioner, there being no legal condonation where the act of forgiveness has not been accompanied or followed by conjugal cohabitation. Addison on Torts 784 ; *Keats vs. Keats*, Jurist, 1857, Vol. 5, 176 ; Bishop 385 ; Shelford 445.

(3). That there is no evidence that the Petitioner's conduct towards the Respondent conduced to her guilty act, or that there was any connivance or collusion on his part.

(4). That the explanations as to the verdict obtained by Petitioner against adulterer, and as to subsequent proceedings thereupon, are legally sufficient—the evidence clearly negating all collusion, (Macqueen 492-495) and the mere fact of non-enforcement of judgment no bar. *Moore's Case* Macqueen 602 ; *Kinnard's Case*, Macqueen 656 ; *Henneage's Case*, Vol. 1, H. of L. Cases 496.

(5). That the adulterer is now in attendance under the process of the Senate and the Petitioner, denying any negligence or collusion, requests that he be examined. *Lord Lismore's Case*, Macqueen 640.

(6). That the judgment in the *Crim. Con.* action is admissible in evidence. Macqueen 487-488-612; Shelford 415; Poynter 201. Judgment recognized already by Senate.

(7). That Respondent is not entitled to have any provision made for her in the bill, there being no evidence that she brought her husband any fortune, there being no precedent in this country for any such provision, and the objection, if of any value, should have been taken before the second reading. Macqueen 508-537-538.

(8). That no legal necessity exists for the barring by clause in bill, petitioner from all right and title in respect of future acquired property of Respondent, he having no right whatever in property subsequently acquired. No precedents in this country for any such provision, and the objections, if of any value, should have been taken prior to second reading.

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#### HENRY W. PETERSON'S CASE, 1875.

*Adultery of wife.—Nothing realized on verdict of damages against adulterer.—An action at law for alimony by Respondent against Petitioner dismissed.—Bill passed.*

Petitioner married E. G. at Guelph, Ont., 21 Nov., 1860 by license according to the rites of the Church of England, and they cohabited together as husband and wife until August 1872, the issue of the marriage being five children.

The evidence showed the Respondent to have been guilty of repeated acts of adultery with one H. F. T., upon the first discovery of which in Aug. 1872, Petitioner refused to cohabit with her and he thereafter lived apart from her. Petitioner brought an action for *Crim. Con.* in the Court of Queen's Bench for Ontario against the said H. F. T., and recovered a verdict against him for \$5000 and entered judgment thereon and exhausted every lawful means for the recovery of the judgment and costs without effect. The Writ of *Fi. Fa.* with the Sheriff's return *Nulla Bona* indorsed thereon, was put in evidence.

It appeared also from the Bill and Answer and Decree produced, that Respondent had brought an action at law against Petitioner claiming alimony, and that the action was dismissed. The Bill passed.

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### MARY JANE BATE'S CASE, SESSION 1877.

*Bill of Divorce by Wife for Husband's Adultery and Bigamy.—Bill passed.*

The parties were married 7th April 1868, and lived together until August 1870, when the husband sent petitioner to live with her father until a home could be provided for her. Four years later representing himself as an unmarried man he went through the ceremony of marriage with another woman, B. P. G., the deception being soon discovered, he was arrested, convicted of bigamy and sentenced to penal servitude. The evidence adduced before the Committee included an exemplification of the Criminal proceedings and the depositions of the witnesses at the trial for bigamy. Both marriages were proved and evidence was given of the cohabitation with the said B. P. G. The Bill passed.

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### MARTHA J. H. HOLIWELL'S CASE, SESSION 1877.

*Bill of Divorce by the Wife for the Husband's Bigamy and Adultery.—Proof by admissions of Husband to witness.—Separation by Mutual consent.—Bill passed.*

Petitioner on 27th July 1851, married C. E. H. in England according to the rites of the Church of England ; arrived in Toronto shortly after ; issue of the marriage of which one child survived. Cohabited as husband and wife until September 1859 ; during such cohabitation the said C. E. H. neglected to provide for the support of petitioner and child, was guilty of cruelty, infidelity and desertion ; formed an adulterous connection with F. M. A., an unmarried woman, with whom he afterwards committed bigamy by marrying at Detroit 28th January, 1876. The said C.

E. H. and F. M. A. subsequently lived and cohabited together at Quebec, and issue were born of the bigamous marriage.

The Act contained a clause barring C. E. H. of all claim &c., to the estate and effects of the Petitioner.

The witness who served the notice of the second reading testified to having then exhibited to the Respondent the certificate of his first marriage for the purpose of identification, and his reply was "that is perfectly right ; " that he had received a duplicate of it when he married Petitioner. Witness identified him by a photograph produced and filed. Witness also showed him a newspaper containing the notice of his second marriage which he admitted was true, and showed him another newspaper containing notice of birth of child by the said F. M. A. which he also admitted was true. The Petitioner in her evidence proved her marriage and produced her marriage certificate ; that their means being exhausted, they separated by mutual consent, she becoming a governess ; that husband ceased contributing anything to the support of herself or her child, and that during cohabitation she contracted from him a disease from which she still suffered. The Clergyman who performed the ceremony of the second marriage in the United States and a witness to prove cohabitation were also called. The Bill passed.

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#### WALTER SCOTT'S CASE, SESSION 1877.

*Bill of Divorce by Husband for Wife's Bigamy and Adultery.—Recovery of Verdict at Law.—Damages not collected.—Bill Passed.*

Petitioner married 1st May, 1866, M.J.R., in County of Simcoe, by license, according to the rites of the Presbyterian Church of Scotland ; cohabited together as husband and wife to 15th October, 1866 ; the said M. J. R. committed adultery with one E. B. W. in 1875, being still the lawful wife of the petitioner ; she married the said E. B. W., 27th July, 1875, and cohabited with him. The petitioner discovered the adultery, August, 1875, and lived apart from her thereafter.

In this case the petitioner stated that his wife had left him against his will; that he had recovered a judgment in damages against the adulterer and issued a Writ of Execution thereon without any return. Petitioner's solicitor proved the prosecution to judgment of the action for damages against the adulterer and the Sheriff's inability to make anything on the Writ of Execution against him. The Bill passed.

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### HUGH HUNTER'S CASE, SESSION 1878.

*Adultery of the Wife.—Proof of Marriage without production of Marriage Certificate.—Denial of Collusion.—Conversation with Wife subsequent to separation as to obtaining a Divorce.—No action at law.—Bill passed.*

Petitioner married C. M. 17th February, 1874. At the end of two weeks she deserted him and eloped with A. T. with whom she had ever since lived in adultery at Toronto, and had borne him children.

In this peculiar case it appeared by the evidence that prior to her marriage with Petitioner, the woman was being courted by T. and she wished to marry him. Petitioner being a man of means, however, he was regarded with more favor by the parents and they persuaded their daughter to marry him in preference to the impecunious T. The sequel shows that she was not long in following the real object of her affections.

No marriage certificate was offered in evidence, the marriage being proved by witnesses present thereat. It appeared by statutory declarations that a marriage license was issued, and a marriage notice published in a local newspaper, but there was no record or return of the marriage to the proper authority by the Clergyman who had since gone to Scotland. The witnesses based their testimony as to the right of the officiating clergyman to perform the ceremony, on the fact that while he was in Canada he had officiated as a clergyman and they had seen him celebrate the communion.

The petitioner denied collusion and the circumstances of the case confirmed his denial. The following portion of his evidence

related to a conversation he had with his wife with respect to an application for a Bill of Divorce :

Q. Was there any arrangement between you or talk about getting a divorce ;

A. Yes, when I met her a year ago last August, I spoke to her about it.

Q. What took place then ?

A. She told me that she was willing to let me clear ; that I was clear enough now as far as she was concerned, as she would never bother me any more. I said I would get a divorce, so that if I wanted to marry another woman, I could do so, and nobody could throw a slur on me. She said it would take a lot of money to get a divorce, and she would never bother me.

Q. What further took place ?

A. I went home again to where I live in the County of Grey, and that is the last I saw of her.

Q. Did she leave you in the first instance with the intention of separating from you ?

A. She never spoke about it. I was to meet her at the station at Mount Forrest the next evening, but she did not come. I went with my brothers, and on the following evening, I went again, but did not meet her. Then her father and I went down to Toronto. Toronto is about eighty-seven miles from Mount Forrest.

Q. When did you ascertain first that she was living with this man T. ?

A. I found out that she was living with this T. Her father went to see her the Christmas following, and he told me that they were living together. This was in 1874, and it was in 1874 we were married.

Q. Did you take any steps then at all ?

A. No.

Q. Did you see her from that time until August 1876 ?

A. No, I never saw her until then.

Q. And you took no steps in the matter ?

A. No, no more than just to try and find out where she was.

Q. When you had the conversation with her, did she tell you with whom she was living ?

A. Yes, she told me she was living with T.

Q. You had not heard of T. or did not know him in any way before she left you ?

A. I had heard of him, but I had never seen him.

Q. Do you know if T. is a man of means ?

A. No.

Q. Did you take any action or enter any suit against him ?

A. No.

The Bill passed.

## G. F. JOHNSTON'S CASE, SESSION 1878.

*Adultery of the wife.—Settlement on advice of Counsel of action for Crim. Con. against adulterer.—Evidence given by adulterer that he had committed the adultery charged.—Bill passed.*

Petitioner on 24th March, 1872, married Charlotte Elsie McArthur, without antenuptial contract between them; lived together as husband and wife to 8th Oct. 1876, when he discovered she had been leading an irregular life and had been committing adultery with one H. J. F. within a year next preceeding and up to and on that date; petitioner thereupon left the house where he had been residing with her, and continued to live apart from her. He subsequently obtained judgment in the Superior Court against said H. J. F. declaring him guilty of adulterous correspondence and condemning him to pay petitioner \$1,000. with interest and costs.

The evidence adduced before the Select Committee of the Senate included the exemplification of the proceedings and the depositions of the witnesses in that suit and the oral testimony of the witnesses personally. It appeared also that on the advice of Counsel, petitioner accepted \$400. in settlement of his verdict of \$1000. because H. J. F. had not the means to pay more.

The adulterer gave evidence and admitted that he had committed adultery with petitioner's wife on the occasions charged in the preamble of the bill. The adultery was also established by the evidence of other witnesses. The Bill passed.

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VICTORIA ELIZABETH LYON'S CASE, SESSION 1878.

*Bill of Divorce by wife against husband for adultery—his infamous disease—his neglect, desertion and non-maintenance of his wife and family.—Bill passed with clause giving wife custody and care of children.*

Petitioner married John Lyon 30th Oct. 1872 in Ottawa; they lived together until 15th March 1875, having 7 children; for some time previous to March 15 Petitioner became aware that



Lyon was living in adultery with several women and he continued doing so afterwards. About this date she discovered that he had contracted an infamous disease, whereupon she refused to further live or cohabit with him as his wife ; it becoming impossible for her owing to this fact to continue the relation of married life with him. After that date he wholly neglected and refused to support or provide for her and the children of the marriage and wholly deserted them. She asked for the custody of the children as well as for a dissolution of the marriage.

The Bill passed.

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#### CAMPBELL CASE, SESSION 1879.

*1876—Application by the Husband for Bill of Divorce from wife on ground of her alleged Adultery.—Verdict in action of Crim. Con. against Adulterer.—Dismissal of Wife's action for alimony in the Court of Chancery.—Counter Petition by Wife denying Adultery and alleging desertion, insult and cruelty against her Husband and claiming a Divorce à mensâ et thoro.—Consideration of Report of Select Committee from the Senate postponed to following Session.—1877—Report considered and passed.—Bill amended in accordance with petition of Wife, passed in Senate subject to protest of minority.—Rejected in Commons for non-publication of notice.—1878—Petition of Wife to proceed in formâ pauperis rejected by the Senate for non-publication of notice.—1879—Petition of Wife for leave to proceed in formâ pauperis granted.—Petition of Wife for passing of a Bill similar to that passed by Senate in 1877.—Motion to pay travelling expense of a witness lost.—Power of Parliament to pass a Bill of Divorce à mensâ et thoro with incidents.—Bill amended and passed.*

The facts of this remarkable case may be best gathered from a recital of the main points in the preamble and a transcript of the operative clauses of the Bill.

In the Session of 1876, Robert Campbell, by his petition to Parliament set forth that in April 1863, he married Eliza Maria Byrne in Canada according to the rites of the Congregational

Church ; that the marriage was authorized by license ; that he and she cohabited together as husband and wife up to 25th August 1873 ; that she did commit adultery with George Gordon at various times previous to and during August, 1873 ; that he discovered it on 28th August, 1873, and after discovery he refused to cohabit and had not since cohabited with her and had since lived apart from her ; that she had since lived separate and apart from him ; that he had subsequently brought an action for *Crim. Con.* in Her Majesty's Court of Queen's Bench for Ontario against the said George Gordon and recovered a verdict of \$1,500, and entered judgment thereon ; that she had brought a suit against her said husband in the Court of Chancery for alimony, which he defended on the ground of said adultery and the action had been dismissed out of Court ; and he desired that the marriage be dissolved ; that there were four children of the marriage and he asked that they be declared legitimate. That the said Eliza Maria Byrne or Campbell by her petition presented during the same session set forth her marriage as above ; that on 25th August, 1873, Robert Campbell deserted her and took away three of the children ; that on 24th September 1873, he with the aid of constables without warrant violently removed her and her youngest child from his house and had ever since refused to receive her and the child, or to maintain and provide for them ; that he had repeatedly accused her of adultery and endeavoured to prove her guilty : that she had not been guilty of adultery ; that he had petitioned Parliament for the dissolution of his marriage with her ; that he had treated her with cruelty and illused and insulted her ; that there was no prospect of reconciliation ; that she desired to be divorced *à mensâ et thoro* ; that there was no Court in Ontario by whose decree such divorce could be effected ; that she was without means for her own or her children's support ; that the Court of Chancery of Ontario having refused her petition for alimony she was without means to secure a revision of that judgment and that she desired to have the care and custody of her youngest child, that her husband's bill might not be passed without amendments which would make it an act providing for such separation between her and her husband as would be effected in England by a decree for judicial separation and compelling him to make adequate pro-

vision for her support and the support of her children and giving her the custody of at least the two youngest of her children.

The enacting clauses of the bill were as follows :

1. From and after the commencement of this Act, the said Eliza Maria Campbell shall be and shall remain separated from the bed and board of her husband the said Robert Campbell.

2. The separation hereby authorized and provided shall except as hereinafter provided, have the same force and the same consequences as a judicial separation in England, under a decree for judicial separation pronounced by the proper Court there at the commencement of this Act.

3. The said Robert Campbell shall pay annually to his said wife for her support and maintenance the sum of five hundred dollars during her separation as aforesaid, in two equal instalments, payable half yearly, on the last days of May and November in each year.

4. The said Maria Eliza Campbell may, after the commencement of this Act, have the custody and care of one of the children of the said marriage, namely, Francis William Campbell, during her separation as aforesaid.

5. The said Robert Campbell shall pay annually to his wife the said Eliza Maria Campbell, the sum of two hundred dollars for the support and education of the said child, while he remains in her custody during her separation as aforesaid. The said sum of two hundred dollars shall be payable in equal half yearly instalments of one hundred dollars, on the last day of May and November in every year during the minority of the said child.

6. If the said Robert Campbell shall neglect or refuse for the space of ten days after the same is due, to pay or cause to be paid into the hands of the said Eliza Maria Campbell or her Attorney, lawfully appointed, any one of the said instalments, it shall be lawful for the said Eliza Maria Campbell to apply to a judge of one of the Superior Courts of Ontario, or to one of the County judges of Ontario, and the said judge is authorized and empowered to grant her application for an order to the said Robert Campbell to pay the instalment or instalments then overdue, together with the costs of the said application and order, and if he shall disobey the said order, he shall be deemed guilty of a contempt of Court.

7. The said Robert Campbell and the said Eliza Maria Campbell may agree that upon the payment of a certain sum of money in hand, or upon the conveyance of a certain amount of property to her for her sole and separate use, the said Robert Campbell shall no longer be liable to pay the half yearly instalments aforesaid, or any of them ; but no such agreement shall have any force or effect until it has been approved by a judge of one of the Superior Courts of Ontario, whose approval, after hearing the

parties, shall be endorsed on the instrument containing the agreement.

8. Before and until the making and approval of an agreement as aforesaid, this Act may be registered in any Registry office in Ontario; and such registration shall have the same force and effect as the registration of an order or decree of the Court of Chancery, under section forty-four of chapter forty of the Revised Statutes of Ontario.

9. If, and whenever the said Eliza Maria Campbell and Robert Campbell shall become reconciled and cohabit as man and wife, this Act shall thereafter have no further or other operation or effect than a decree for judicial separation would have in England under like circumstances

The hearing of the evidence began on 13th March, and was continued for 13 days.

On March 10, Mrs. Campbell presented a petition praying that her husband might be directed to furnish her with the necessary means to obtain professional aid for opposing the bill of divorce, and that all further proceedings on the bill might be stayed to allow reasonable time for her to prepare to oppose it. This petition was referred to the Select Committee, and an order was made requiring the husband to deposit \$250, to cover the cost of witnesses, and at a later stage the committee required a further deposit of money to cover remaining costs. Subsequently the Chairman of the Committee taxed \$500 as Counsel fees to Mrs. Campbell's Counsel (*b*),

March 29. Petition presented from Mrs. Campbell "praying that the bill for the relief of Robert Campbell may not pass without certain amendments," being the petition referred to in the above preamble.

March 31. The Select Committee made a special report setting out the hearing of the witnesses and the petitioner, the consideration of same and the exemplification of judgment and the conclusion that the allegations contained in the preamble of Robert Campbell's bill had not been proved. As to Mrs. Campbell's petition that the bill should not pass

(*b*) After Campbell's application had been dismissed, Mrs. Campbell's Counsel continued the application on her behalf for the divorce *a mensa et thoro*, and claimed \$50 a day for 7 days services in promoting the bill,

and recovered judgment therefor from Campbell. *McDougall v. Campbell*, 41 U. C. R. 352. This was reversed on Appeal but the judgment of the Court of Appeal was never reported.

without certain amendments, the committee reported that they found themselves unable to consider the question of amending the bill in the way prayed for without instructions from the House. The committee recommended that in the event of no decision being come to by the House during the then session, that further proceedings therein might be suspended in order that the same might be proceeded with the following session.

In moving the adoption of the Report in the House, Senator Dickey said, that in order to save the testimony that had been given, in the event of no decision being come to on the bill during that session, further proceedings should be suspended. He found on reference to authorities that this course was perfectly clear, and in accordance with precedents both in England and Canada. The Rule was laid down in "*May*" (Edition, 1873), page 701, that even where a dissolution of Parliament was anticipated before the private business of the session was disposed of, it was customary to suspend such business until the following session. There were two precedents in Canada, one in 1864, when the Legislative Assembly on the one hand and the Legislative Council on the other hand had a political crisis, and they passed resolutions each for themselves, not only to suspend consideration of private bills but also of public bills until the following session. The same thing occurred in 1865. In the present case the recommendation would subserve the purpose of justice, and if the man were to renew his application next year the committee would not have to take all the evidence over again. Or if the application were made on the part of the wife, then there might be very great difficulty in getting access to this evidence, if it were not kept as a record. Therefore for the purposes of justice, if the House should make no order on the bill, it was desirable that the evidence should not be lost.

April 8th. Mrs. Campbell's petition and the evidence having been referred back, the Select Committee made a second report finding the material allegations contained in her petition to be true, and the report was in other respects similar to the first.

April 10th. The consideration of this report, was postponed until the next session, and in the meantime the evidence was to be printed for the use of the members. Authority for this being

questioned in the following session, the Speaker of the Senate cited Todd's *Parliamentary Government*, 1st edition, Vol. 1., p. 247 ; (2nd edition, p. 388,) and recalled the action of the Legislature of Canada in 1863 when by resolutions of both Houses, bills were continued to the next session and then taken up and passed (c).

1877—April 9th. The Senate resumed the case at the instance of Mrs. Campbell at the stage where it stopped in the previous session ; no public notice of application being given by her.

April 19th. The Bill was read a third time and passed subject to the following protest from the minority :

First—The Bill should not pass, because the Bill was not preceded by notice and petition as required by the Rules of the House from Eliza Maria Campbell, in whose behalf the Bill was ultimately passed.

Second—Because the Bill passed reverses every provision in the original Bill and grants a separation from bed and board at the instance of the wife ; whereas that Bill sought for a divorce *à vinculo* at the instance of the husband.

Third—Because the provision of the B. N. A. Act conferring upon Parliament the power to deal with questions of marriage and divorce does not include the power to deal with questions of simple separation from bed and board.

Fourth—Because the questions of alimony and questions regarding the custody of children dealt with in this Bill in this instance can be heard and disposed of in each of the Provinces of the Dominion, by the ordinary tribunals of the country.

Fifth—Because the question of alimony in this case has already been decided by a court of competent jurisdiction in the Province where the parties reside, and that such a decision should not be overruled by an Act of Parliament.

Sixth—Because the said Bill deals with matters which, under the B. N. A. Act, 1867, come under the exclusive jurisdiction of the Provincial Legislatures.

Seventh—Because even admitting the competency of this Parliament to deal with the matters affected by this Bill, the proceedings have been unusual and contrary to Rules and the precedent in their character, in this, that no bill was referred to the Committee of the whole, but simply the report of a Select Committee of last session which did not even recommend the bill now passed to the House, but simply appended to their

Report the suggestion of certain proposed clauses ; and in this that the bill passed was never submitted for a first or second reading, and, in fact, has had no such readings, and therefore was not in a position to be read a third time (*d*).

1877—April 23. On reaching the Commons, the bill, as amended and passed by the Senate, was rejected by the Standing Orders Committee because of the non-publication of the notice of application. The action of the Committee occasioned much surprise. It was submitted by Mrs. Campbell's Counsel, Hon Wm. McDougall, C.B., Q.C., that notice of application was not necessary because Mrs. Campbell merely sought to amend the bill introduced by her husband in the previous session, and all notices required by the Rules of Parliament had been duly published in respect to that bill, and the consideration of the same had been by the action of the Senate postponed from the previous session. "To hold that a person seeking to amend a bill properly before Parliament could be met by the objection of non-publication of amendments for a period of six months before the Bill had appeared in print, or was even committed to paper, would," as counsel contended, "be an abuse of power and an insult to the common sense of mankind."

This point is useful as showing that in matters of procedure the Commons may not adopt any unusual proceeding of the Senate.

1878.—In the following session Mrs. Campbell renewed her application by a petition praying for leave to prosecute her cause of divorce *in formâ pauperis*, but she was obliged to abandon the application because of non-publication of the notice thereof. It was again unsuccessfully contended on her behalf that the matter as originally introduced in 1876 was still before Parliament.

1879.—March 17. Notice of Application having been now duly advertised, Mrs. Campbell's petition praying for leave to proceed *in formâ pauperis* was granted.

April 4. A motion that the witness who proved before the House the due service of the Notice of application be paid for his time and necessary travelling expenses, was lost on a division. It appeared that there was no precedent for the application ; that

(*d*) Senate Journals, 1877, p. 261.

in an action at law *in formâ pauperis* the court has power only to remit fees, not to order payment ; that it is only in case of a *public* inquiry, not where the House is constituted a judicial tribunal, that Parliament has ever paid the expenses of a witness before its committees ; that if petitioner succeeded in this case she might tax certain costs and disbursements against her husband, but not anything remitted by the grace and favour of the House.

Sir Alexander Campbell considered the Order of the House to the witness nothing more than the order of a court ; nothing more than a subpoena directing a witness to appear. He might have refused to come here until his expenses were paid. There was he said a precedent for this in the Martin case. A witness residing at Barrie was summoned. He came and refused to give evidence until he was paid an amount in which he said he was short of in his travelling expenses. Money had been paid him with the order, but not sufficient. The Committee upheld his demand, and in the presence of the Committee he was paid the amount of the deficiency (*e*).

April 18th. On the motion for the second reading of the bill, an amendment that it be referred under Rule 55 of the Senate, to the judges of the Supreme Court of Canada for examination and report as to the right and power of Parliament to pass such a bill, was rejected on a vote of 22 to 32. In the course of the debate on this motion a memorandum was read from Mr. Alpheus Todd, (Librarian of Parliament), in which he expressed the opinion that Parliament possessed, under the British North America Act, 1867, ample and sufficient powers to deal with Marriage and Divorce, and with all legal questions growing out of the marital relation at its sole discretion (*f*).

The point at issue at this stage of the discussion, was, the jurisdiction of Parliament to grant the wife alimony and her right to the custody of the children. The opponents of the measure contended that the Courts of Ontario had power to grant relief in this respect, and that if Parliament also assumed to grant relief on these two points there would be an interference with civil rights which, under the constitution, were not within the control of the Federal Parliament but were vested in the Provincial Legislature.

(*e*) Senate Debates 1879, p. 250  
& 278.

(*f*) Senate Debates 1879, p. 287



The contrary view, which was ultimately sustained in the Senate, was thus put by Senator Miller (g):

“ Under the B. N. A. Act, legislation in regard to civil rights is given exclusively to the local legislatures, but it cannot be controverted, I think, that while the Parliament of Canada has exclusive power to deal with any subject of legislation, so far as it is necessary to deal with civil rights in connection with such legislation, we have the undoubted power to deal with them: where this Parliament has the right to legislate on any subject it must be considered that we have the power to legislate regarding all matters incident to that subject. Take any one of the numerous subjects over which legislative authority is given to this Parliament by the B. N. A. Act. Take the subject of insolvency and bankruptcy. It cannot be denied that Parliament, in dealing with the subject of insolvency, has dealt with the civil rights of the subject in the most unlimited manner. Therefore, it must not be supposed that where this Parliament has power to deal with a subject, it has not the power to deal with civil rights, as incident to that subject. Some honorable gentlemen contend that this application is only sustainable as coming from Ontario. I contend that an application of this kind is sustainable coming from any Province of the Dominion. The existence of Divorce Courts in any of the Provinces does not lessen the absolute control of Parliament over matters relating to Marriage and Divorce. We have Divorce Courts in Nova Scotia, New Brunswick and Prince Edward Island, and there is a Court in Ontario for granting alimony to a party separated by divorce *a vinculo* or *à mensâ et thoro*, or without any divorce. We have a Court in Ontario with power to deal with that question, it is true, but it must be recollected that since the establishment of these various tribunals in the different Provinces, the whole legislative power, the whole functions of the Government of this country have been remodelled anew, and under the B. N. A. Act, this question has been given absolutely to the control of this Parliament. It is true, that by that Act, these these Courts are allowed to maintain their concurrent jurisdiction on this question until the Parliament of Canada deprives

“ them of it. But we could abolish all these tribunals at any  
 “ moment by an Act of Parliament. Is it not, therefore, absurd  
 “ to say that if we have the power by Act of legislation to sweep  
 “ out of existence the Divorce Courts of the Provinces, and  
 “ deprive them of all their authority respecting the subject of  
 “ Marriage and Divorce, that we have not the power to deal with  
 “ the whole subject and its incidents under the terms of the B. N  
 “ A. Act? I think there cannot be very strong doubts that we  
 “ have the power. Marriage and Divorce and everything which  
 “ is incident to Marriage and Divorce, as a logical sequence and  
 “ corollary, are within our jurisdiction. What then is alimony?  
 “ It is maintenance after the separation of the husband and wife  
 “ It is an incident of the contract of marriage. So control o  
 “ children is also a right growing out of the same contract; and  
 “ therefore, being incident to the marriage relationship, belongs to  
 “ the jurisdiction of this Parliament ”

In the Commons the Bill excited considerable debate, but was finally passed.

This is the first instance of a Bill of Divorce being assented to in Canada without being reserved for the assent of Her Majesty.

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#### MATTHEW GARDINER'S CASE, SESSION 1882

*Bill of Divorce by Husband on ground of his Wife's alleged Adultery.—Substitutional service of notice of application on Solicitors of the Wife.—Husband ordered to pay retainer of \$20.00, a day for attendance to his Wife's Counsel.—Condonation.—Further proof required by Committee of genuineness of letters produced by Petitioner in support of his case.—Bill abandoned.—Exhibits returned.—Fee on Bill returned less expenses.*

On the motion for the reading of the petition the affidavit of the witness proving service showed that notice of application for a bill was given for the session of 1880, but in consequence of Parliament meeting earlier than usual, the notice was not published the full six months. Petitioner's wife was served personally with a copy of that notice. The publication of the notice was renewed

for the session of 1882 but personal service of copy thereof was not effected owing to inability to find Respondent. Her Solicitors, however, accepted service in writing for her. On Motion, the House considered the attempt to effect personal service sufficient and the petition was read.

The Bill was read a first time on 1st March. Mrs. Gardiner presented a petition setting forth that she was in very distressed circumstances and incapable of raising money for her defence, and praying that by Order of the Senate she might be supplied with means by her husband to maintain her defence and opposition to his petition for a bill of divorce. This petition was referred to the Select Committee. On the opening of the case before the Committee, her Counsel renewed the application and read a lengthy declaration made by her. He cited *Moreau's Case*, Macqueen, p. 578 and *Edward's Case*, Macqueen, p. 583; *McDougall v. Campbell* 41. Q. B. 332 & seq.; Macqueen pp. 531-2.

Petitioner's Counsel opposed the application. The Committee ordered that Petitioner pay forthwith to his wife's Counsel, \$20 retaining fee and \$20 for attendance one day, which was complied with. Subsequent orders were made and complied with for the payment to her Counsel of \$20 a day for two days, and \$10 a day for two days further.

The preamble of the bill alleged that Petitioner married Elizabeth Robertson on 5th June 1876 at Meaford, Ontario; and that they lived and co-habited together as husband and wife up to October 1878, when he discovered that she had in July 1878, and on several subsequent occasions committed adultery with one Thomas Quail.

The charge of adultery was sought to be established upon the uncorroborated evidence of a servant girl who had resided with the parties. On the completion of her evidence in chief she left Ottawa and thus avoided cross-examination. A summons was issued for her attendance but service was not effected. Respondent and one of her witnesses testified as to the bad and untruthful character of this witness.

Petitioner's examination disclosed that he founded his suspicions of the alleged misconduct of his wife upon report from his father and mother and other relations who were unfriendly to his

wife ; that he retained Quail in his employment after he suspected his wife and that he had taken no action of damages against him. He also admitted co-habiting with his wife for some months after the date of his discovery of her alleged infidelity. He produced a number of letters alleged to have been written by her in some of which she admitted her guilt. These letters were, with one exception, declared by her to be forgeries, and her brother corroborated her on this point. Respondent besides denying the charge of adultery, gave evidence of great neglect by her husband of herself and child. At the conclusion of her evidence Respondent's Counsel declared that he wished to produce further testimony on her behalf and he applied for an order for payment by petitioner of the expenses of such witnesses as he might require.

Counsel for Petitioner declared that Petitioner could not afford to advance any further sums for expenses of Respondent's Case.

After deliberation, the Committee ordered that further evidence be adduced by Petitioner to prove the genuineness of the letters produced and filed in support of his petition. Counsel for the Petitioner thereupon declared that Petitioner would abandon his bill.

The Committee reported accordingly and recommended a return to the respective parties of all vouchers and exhibits, and a return to Petitioner of the sums paid to the Clerk on the bill, less the expenses. This Report was adopted.

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#### PETER NICHOLSON'S CASE, SESSION 1883.

*Bill of divorce by husband on the ground of alleged adultery of the wife.—Husband ordered to pay fees to Counsel of his wife to conduct her defence, \$2.00 a day for her expenses, \$75. for her witnesses, and \$15. for her travelling expenses.—Conflicting and uncertain testimony of the witnesses.—Unsatisfactory conduct of the petitioner, and finally, upon production of Articles of Separation showing collusive agreement to consent to any future proceedings for divorce—Bill rejected.*

The bill having been referred to the Select Committee, a petition from Mrs. Rosetta Nicholson was presented to the Senate

and read praying in regard of her destitution and want of money, that the House would be pleased to direct that her husband supply her with means to maintain her just defence and opposition to her husband's petition for divorce. The petition was read presently and referred to the Select Committee, which subsequently reported that it had ordered that the Petitioner pay Counsel of Respondent \$20 on the first day, and \$10 a day thereafter, and to Respondent a sum of \$2.00 a day for expenses in Ottawa. This Report was adopted.

The Committee stated in their final Report that the Petitioner had complied with a further order to deposit \$75. with the Clerk for the expenses of witnesses for Respondent, and a further payment of \$15 to her for travelling expenses.

This is a remarkable case on account of the conflicting character of the evidence, which if it did not show a deep conspiracy against Respondent must have resulted from an astonishing misinterpretation of facts trifling in themselves. Peter Nicholson married, as his second wife, Rosetta Saxton at Toronto in 1870. In consequence of his violent conduct towards her she was compelled to flee from his home in 1876, and an agreement to separate being drawn up and signed, she went to her father's house in Michigan. Nicholson failing to keep up his payments for the maintenance of his wife and their two children, she proceeded to where he was residing in Canada and new Articles of Separation were drawn up by which he agreed to pay her \$200. per annum while undivorced and unmarried. The document also contained the following remarkable clause. "And the said Peter Nicholson and Rosetta Nicholson hereby agree that in case an application be made at any time by either of them for a divorce and a decree annulling their marriage, that these presents shall operate as a full and unqualified consent to said decree and on being filed in any court of competent jurisdiction shall bind all parties accordingly." The preamble of the bill did not allege the existence of this agreement but stated that the parties had separated by mutual consent, and it was only on the examination of Respondent before the Select Committee that the existence of this document became known and was produced.

Petitioner's witnesses testified to seeing Respondent cohabiting

with one Jones in Detroit and to nursing an infant child in 1881. A clergyman testified to having married Jones and Respondent in 1882, but had some doubt subsequently as to the identity of the parties. His wife was a witness to the marriage and afterwards identified Respondent as the woman she then saw married. A doctor swore to having attended Respondent in a confinement in 1881. Respondent testified to treatment of the most barbarous character from Petitioner while she lived with him prior to her separation in 1876, and he himself admitted that he was, at the time of hearing of this case by the Senate, defendant in an action of damages for seduction. Respondent further denied adultery or cohabitation with Jones and explained the various remarks Petitioner's witnesses had sought to use to her prejudice. The man Jones denied his alleged marriage with Respondent or that he had ever been guilty of any improper conduct with her.

The Committee reported the preamble not proved and recommended that the Bill be not passed. The Report was adopted.

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#### JOHN GRAHAM'S CASE, SESSION 1884.

##### *Adultery of the wife.—Bill passed.*

Petitioner on 4th, October 1859, married Sarah Ann Graham ; they cohabited together as husband and wife up to 5th, May 1882, when she left him for the United States and there lived in a state of adultery with a certain person named in the evidence ; Petitioner then discovered that she had been leading an irregular life, and that she had within the year next preceding that date been committing adultery with the person named in the evidence.—This Bill passed.

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#### GEORGE B. COX'S CASE, SESSION 1885.

##### *Bill by the husband for the wife's adultery.—Bill passed.*

Petitioner married on 14th July, 1875, his cousin Emily Cox ; they lived and cohabited together as husband and wife up to 10th October, 1878, when she refused to continue to live with him In

1882 she went to California and there lived in a state of adultery with J. E. E. The evidence showed previous improper conduct by Petitioner's wife with J. E. E., and when she left she proceeded to California with J. E. E. and there married him.

A certified extract from the Parish Register made by the clergyman officiating at the second marriage was produced, and one of the witnesses present at the marriage proved it.—The Bill passed.

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#### AMANDA ESTHER DAVIS' CASE, SESSION 1885.

*Bill by wife against husband on ground of adultery, cruelty, desertion and non-support of wife.—Judgment in action for Separation from bed and board.—Bill passed.*

On 8th June, 1881, Petitioner married J. De Sola according to the rites of Jewish faith ; they lived and cohabited together up to 19th January, 1883, during which period her husband neglected to provide for her and was guilty of such cruelty that while pregnant she miscarried and was confined to her bed for four months ; Petitioner was by contract of marriage separated from her husband as to property ; her husband stole her effects from her and sold and pawned them for his own use, and he made away with large sums of money belonging to her ; he committed adultery with divers women from the day of his marriage ; in consequence of his conduct she was obliged to return to the house of her father, where she had continued to reside. About 15th February, 1883, he absconded from Canada and went to reside in the United States ; after his departure from Canada he never contributed anything to the support of petitioner, but led a disreputable and dissipated life, living in great part in a brothel in Boston as paramour to the keeper thereof. There was no issue of the marriage. On June 25th, 1883, on Petitioner becoming aware of the adultery and conduct of her husband, she instituted an action for separation from bed and board from him before the Superior Court for Lower Canada and judgment was rendered in her favor with costs.—The Bill passed.

## GEORGE L. E. HATZFIELD'S CASE, SESSION 1885.

*Adultery of the wife—Delay in taking proceedings—Circumstantial evidence—Order of the fee of \$25,00 to Respondent's Counsel after hearing evidence for defence—Bill passed.*

On 7th, August 1869, Petitioner married Anna Maria Freyseng; she deserted him on 10th, May 1873, and went to New York and afterwards to Germany and subsequently to Toronto. He first learned of his wife's infidelity with one Klostermann in 1876, but did not begin proceedings until 1885, for want of means. He obtained a judgment for \$1000. damages against Klostermann but recovered nothing on the writ of execution.

In presenting the Report of the Committee to the House, the Chairman, (Hon. Mr. Kaulbach) stated that the allegations of the preamble of the bill were proved by circumstantial evidence of the clearest character, and that the evidence of the Respondent herself, in the opinion of the Committee, rather strengthened the allegations of the Petitioner (*h*).

A petition from the Respondent to the House praying that by order of the Senate she might be supplied with means by her husband to maintain her just defence in opposition to the petition of her husband, was referred to the Select Committee. And on the following day her Counsel asked the Committee for an allowance for Respondent. Counsel for Petitioner requested permission to ask Respondent some questions as to the statements set forth in her petition and asked that the consideration of the allowance be deferred until after the examination of Respondent to see if she had a good defence. Counsel for Respondent urged that the practice was to make the allowance at the preliminary stage of the proceedings.

The Chairman (Hon. Mr. Kaulbach) said there was no allegation in her petition that she had a defence, and ruled that the evidence should first be heard and that the Committee would then be governed in their decision on the petition by the evidence adduced. The Committee subsequently ordered that the petitioner pay to the Clerk of the Committee \$25.00, as Counsel fee for the Respondent's Counsel for conducting her defence.

The Bill passed.

(*h*), Senate Debates, 1885, p. 276.



## ALICE ELVIRA EVANS' CASE, SESSION 1885.

*Bill by the wife against the husband on ground of his adultery and desertion.—Delay in resorting to Parliament explained.—Clause giving Petitioner custody of child struck out—Inexpediency of interfering with matters which, although incidental to divorce, have been delegated to Provincial courts.—Bill amended and passed.*

On 16th March, 1874, Petitioner married O. N. E. ; they lived and cohabited together as husband and wife until 16th October, 1875, and there was issue one son. Owing to his adultery with several women it then became impossible for Petitioner to continue to live with him as his wife ; he afterwards formed an intimacy and committed adultery with one Nellie Morris ; he never contributed anything towards the maintenance support of Petitioner and her child. The Petitioner prayed also for the custody and control of her child.

There was a lapse of nine years from the admitted discovery of adultery, to the first step in the application a year previous to the hearing the evidence, which delay, Petitioner explained by stating that she had been unable to ascertain the whereabouts of her husband, although she had inquired and advertized for him. It appeared also that she had been obliged to support herself and child by her own work.

With respect to the clause of the bill granting the custody of the child to the Petitioner, it was urged that while Parliament has jurisdiction as well as the ordinary legal tribunals of the country in matters relating to the custody of children and the disposition of property, yet, as a matter of convenience and expediency, subjects of that kind should be left to the Provincial Courts to determine (i). The retention of this clause not being pressed by Petitioner's Counsel, it was struck out in the House after the adoption of the Report from the Select Committee.

This case came from the Province of Ontario, in which Province the High Court of Justice has power to determine the custody of the children. The evidence before the Select Com-

(i) Senate Debates 1885, pp. 113, 365-366.

mittee showed that the husband was a profligate man who had deserted his wife and child, and had never contributed anything towards their support. In view of this fact, and of the precedents of past legislation giving the wife Petitioner the custody of infant children, as incidents arising out of divorce, and in view of the fact too that the policy of modern jurisprudence is to grant all relief sought, by one action or proceeding, it seems strange that the prayer of this Petitioner was denied as to the custody of her child.—The Bill, thus amended, was passed.

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### CHARLES SMITH'S CASE, SESSION 1885.

*Agreement of separation, whereby husband renounced all control over his wife.—Collusion and connivance, and acquiescence in adultery committed by his wife thereafter.—Bill rejected.*

Petitioner on 8th, February 1876, married Respondent, a widow with some property. There was some disparity in their ages, he being her junior by some years. Disagreement occurred which led to her finally leaving him within a few months after the marriage. In her evidence before the Select Committee Respondent stated that having received an offer of marriage in 1879, she endeavoured to procure a divorce in Michigan from her husband the petitioner, but was obliged to give up the attempt for want of means. Petitioner and a friend named Douglas subsequently informed her that in the event of her getting married again Petitioner would not trouble her, and the following document was signed by the parties and given her.

“I, Charles Smith of Warkworth, miller by trade, do certify  
 “that having married Mahaly Alwilda, widow of the late Henry  
 “Zufelt, and finding that the said Mahaly Alwilda to be an unsuit-  
 “able companion to enjoy life with, and being separated from the  
 “said Mahaly Alwilda as my wife, I hereby pledge my word and  
 “honor to never molest or control or take any steps against her  
 “ways or proceedings in any way whatever in the event of her  
 “marrying again or whatever she chooses to do. I, Charles Smith  
 “will also drop her name as Mrs. Smith.”

His friend Douglas wrote her that he had seen Petitioner and

that he made no objection to sign the above document in order to place her in a position to get married. Petitioner also wrote her about the same time.

"If you are tired of living the way you are it is your privilege to better it if you can, as you and myself cannot live together any more and I will not throw a straw in your way, and if you want to get married do so for all me, and if you send us word we will come to the marriage feast, and wish you all the joy in store for you, as there is none for me."

Respondent married again a couple of months later (May 1880) and her cohabitation with the second husband was admitted and proved. Upon this Petitioner founded his bill for relief. The Committee recommended that the bill be not passed inasmuch that they found that there had been collusion and connivance on the part of the Petitioner relative to the acts of adultery committed by his wife; and that moreover at the time of the adultery of which he complained, she was by his consent living separated and apart from him and released by him as far as in him lay from her conjugal duty.

In moving the adoption of the Report of the Committee the Chairman (Senator Gowan) said: "There was evidence before us that the Petitioner intended the adultery which he complains of should take place; that he not merely did not interfere, but that he encouraged it by his criminal connivance. He had a willing mind, he acquiesced, and now he comes before Parliament complaining of his wife's adultery and seeking to have the tie dissolved on that ground! *Volenti non fit injuria*. He who was accessory before the fact seeks to take advantage of his own wrong doing; he who encouraged his wife to commit an act to his own dishonour now asks Parliament, against all authority, human and divine, to sanction his base connivance."

The Bill was accordingly rejected.

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#### F. E. J. TERRY'S CASE, SESSION 1885.

*Bill by wife against husband on ground of adultery, cruelty and neglect.—Admission of adultery by husband to his wife.—Bill passed.*

Petitioner married C. H. T. at Ottawa on 12th September,

1877; they lived and cohabited together as husband and wife from that date up to about April, 1883, during which period the husband became excessively addicted to the use of intoxicating liquor and neglected and cruelly used and abused Petitioner; during her absence in England for the benefit of her health he committed adultery with Mrs. H. H. L. with whom he subsequently lived and cohabited; Petitioner discovered the adultery on her return from England in October, 1883. Petitioner obtained an Order against him from the High Court of Justice, Ontario, for interim alimony; and he made payments thereunder until May, 1884, when he left Canada and ceased making payments or contributing towards her support.

In this case no specific act of adultery was proved against Respondent. He, however, admitted to Petitioner that he had been guilty of adultery with the woman named (*19 Senate Journals, 1885, Appendix 3, p. 4*), and several witnesses testified to their conduct being so improper that the circumstances were such that adultery could be safely inferred. There was also evidence of neglect, cruelty and personal violence to Petitioner.—The Bill passed.

### FLORA BIRRELL'S CASE, (j), SESSION 1886.

*Bill by wife for adultery of the husband.—Fraud in obtaining a decree of divorce from Superior Court in Michigan.—Decree not recognized in Canada.—Bill passed.*

Petitioner married, 1st November, 1865, W. H. Birrell, with whom she lived and cohabited as his wife until about 28th April, 1879, when, owing to his ill treatment it became impossible for her to continue to live with him as his wife. On 23rd August, 1884, without her knowledge or consent, he obtained a decree of divorce in the Superior Court of Detroit in Chancery, and in the following month went through the form of marriage with one Adelaide

(j) In connection with this case see *Magurn v. Magurn*, 3 Ont. R. p. 570, and 11 Ont. A. R. p. 178, in which the recent English authorities

on domicile were thoroughly discussed, and the effect of a divorce obtained in a foreign country by a domiciled Canadian was referred to.

Talbot, with whom he afterwards lived and cohabited. He had by his declaration filed 11 October, 1874 announced his intention to become a naturalized citizen of the United States of America.

Hon. Mr. Dickey, in supporting the motion for the adoption of the Report of the Select Committee, directed the attention of the House to the principle of international law arising out of the comity of nations, that the decrees of a competent foreign tribunal are recognized as *prima facie* correct decisions that should be respected in all other countries, consequently if the above decree of divorce was a regular decree properly pronounced, there could be no adultery because the parties were regularly separated from the marital relation as man and wife.

The correctness of this principle as applicable to proceedings before Parliament was, however, not questioned for the reason that the evidence disclosed gross fraud on the part of the husband in obtaining the decree. His domicile was in London, Ontario. but he attempted to establish it in Detroit, Michigan, by renting a room there and occasionally going and spending a day or two in that city, returning afterwards to London. His declaration of intention to become a citizen of the United States was dated six weeks after the decree dissolving his marriage had been issued by the Michigan Court. The evidence upon which he obtained this decree was upon these facts, clearly untrue. He moreover testified that Petitioner had cruelly deserted him without his knowledge, procurement or consent, whereas the fact was, that he was a party to a formal deed of separation in which he and Petitioner agreed in July, 1883, that they should continue to live separately, and he had actually paid Petitioner an annual allowance to induce her to live separately from him. It appeared too that Petitioner had not received notice of the action in Michigan in which the above decree was ultimately issued. Upon these facts the Committee determined that in obtaining the Michigan decree of divorce he had been guilty of fraud and perjury in swearing to facts which were entirely opposed to the evidence and opposed to documents over his own signature, and that consequently that divorce should be set aside. There being no other means by which Petitioner could get rid of this sham divorce, and be put on the same footing as her husband, the House decided to grant her application. The Bill accordingly passed.

## SUSAN ASH'S CASE, SESSION 1887,

*Bill by the wife to dissolve her marriage, her husband having obtained a decree of divorce from a Court in a foreign country —Parliament cannot be bound by the decree of the court of a foreign country.—The powers of Parliament.—Bill passed.*

The law of domicil, as well the effect of a decree of a foreign court dissolving a marriage which had taken place in Canada, was thoroughly discussed in this case. The facts were as follows : Manton married Susan Ash in Montreal in 1868 ; she lived with him in Kingston, Ontario, for six weeks, and then left with his consent to visit her father in Montreal. On her return six weeks later she found his property had been sold, and he had given up housekeeping. She resided with him at his boarding house, but his intemperate habits rendered life with him intolerable, so she left him shortly afterwards, this time without his consent, and returned to her father's in Montreal, where she had since continuously resided. Manton went to the States, and in 1874 obtained from the Court of Massachusetts a decree of divorce from Susan Ash, on the ground that she had deserted his home. There was no evidence before the Senate Committee of his residence there other than the recital in the decree, which, being put in evidence, recited that for the period of five consecutive years preceding the time of his application to the Massachusetts Court, Manton had resided in Boston. On 3rd September 1874, Manton married again at Stirling Ontario, a woman named Hatch, and they removed at once to Boston, remaining there living as husband and wife, and had a family. Susan Ash founded her application upon this decree of divorce, alleging that being for a cause not recognised in Canada, the decree was null, and therefore the second marriage bigamous.

The Select Committee struck out of the preamble of the Bill, the portion relating to this decree of divorce, because the decree itself had not been properly proved, and they limited the ground of relief to the express charge of adultery. The absence of proper notice to Susan Ash of the suit for the decree and the fact that it was granted for a cause not recognised in Canada as a reason for divorce, were also matters of consideration with the Committee.

In the debate on the motion for the adoption of the Report, an opinion being advanced that a foreign divorce if rightly carried out without fraud, without perjury, and after due notice to the other party, and the parties have a domicile in that country, is conclusive in Canada, gave rise to a discussion as to the extent that Parliament could be bound by decrees of foreign Courts. Senator Gowan claimed that as Parliament was a maker, not an expounder of law, it could not recognize the laws of a foreign country as having any force or effect as against itself, and that consequently foreign decrees though perfect and correct, in every respect, could have no force here. Hon. Mr. Abbott laid down the principle that as the Parliament of Canada has not yet recognized the power of any Court to deal with the subject of divorce, there is nothing binding in the argument which claims by the comity between nations, for a judgment by a foreign Court that kind of consideration and recognition by the Senate which that judgment might have before an ordinary tribunal, upon a matter the subject matter of which was common to both. The views of these gentlemen were sustained in the Senate on a vote.

In the House of Commons the bill excited much discussion on the question of domicile and on the minor point as to whether the preamble of the bill should under the circumstances contain the allegation that the Respondent was living in a state of adultery with Mary Ford Hatch. A considerable number of the members of the House were unwilling in so many words to stigmatize the position of this woman and her children by Respondent, inasmuch as it appeared by the evidence that she had contracted her alleged marriage with Respondent under the belief that he had been properly divorced by the decree of the Massachusetts Court. The preamble was accordingly amended by the elimination of the words "in a state of adultery." The Bill thus amended was sent back to the Senate and the amendments being concurred in it was passed without further change (*k*).

(*k*) For further notes on this case, see Ante pp. 64-72.

## WILLIAM A. LAVELL'S CASE, SESSION 1887.

*Bill by husband to declare void ab initio a marriage solemnized under fictitious names.—Absence of parents' consent to marriage of minor.—No consummation of marriage.—Bill passed.*

The facts of this case were as follows. Petitioner, Dr. Lavell, had been keeping company with Respondent, Ada Marie Caton, a minor, for some years with the intention of marriage. They agreed to be married under assumed names. On the 29th September, 1882, they proceeded together to Hamilton, Ontario, and Petitioner went to the Issuer of Licences and obtained a marriage license in the usual form under fictitious names. Later in the day they were married in presence of witnesses, by the Rector in the Episcopal Church in that City, and both entered their names in the Parish Register as Arthur Vané, and Marie Herbert. The marriage was never consummated, and its celebration was concealed from the relatives of both parties. The Petitioner went back to his practice, while she remained at home with her parents. In his evidence before the Select Committee, Petitioner said they would have lived together had he been financially able to support her as his wife. There was no satisfactory evidence of consent by the parents to the union. Three months after the marriage, she informed him that she had received an offer of marriage, and in February following, W. G. F. informed him he was going to marry Respondent. Upon his objecting to this, F. stated that legal advice had been taken that Petitioner's marriage was void. At a subsequent meeting with Petitioner she produced a letter from Counsel to this effect, whereupon Petitioner ceased further opposition, and the marriage with F. took place.

In his Notice of Application to Parliament, Petitioner asked for a bill declaring his marriage null and void, on the ground that it was entered into under false names, or in the alternative for a bill of divorce from his wife Ada Marie Lavell, on the ground of desertion, bigamy and adultery, but the bill itself was in the ordinary form for divorce.

The Report of the Select Committee to the House recommended the passing of the bill, but with amendments that carried the implication that Respondent was guilty of adultery.



Senators Gowan and Vidal urged the injustice of passing a bill in this form branding the Respondent all her life with a charge of adultery, which was clearly the result of Petitioner's falsehood and fraud at a time when she was a minor and unable to properly judge of the effect of the proceedings into which he had led her. Senator Gowan pointed out that there was an absence of consent of the parents, but he was not prepared to say that the law was settled in Ontario as to the validity of a marriage without consent and not consummated, with a minor. He was of opinion that the Bill might be framed on the basis of that in the Stevenson Case (1869).

The Bill was accordingly amended in Committee of the whole House, and the parts of the preamble charging adultery by Respondent with F. were eliminated and the character of the bill was completely changed from the ordinary bill of divorce into a bill declaring the first marriage void, the operative clause being the same as in the Stevenson case (1869) namely, "the said marriage between, etc., is and shall be henceforth null and void to all intents and purposes whatsoever."—The Bill was then read a third time and passed.

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#### JOHN MONTEITH'S CASE, SESSION 1887.

*Bill of Husband against the Wife on the ground of her Adultery.—  
Identification of the parties.—Bill Passed.*

Petitioner married Mary Wright on 31st December, 1870. There were four children, issue of the marriage. On the 11th May 1885, she deserted petitioner and her children and eloped with W. G. N. with whom she committed adultery.

The witnesses who proved the adultery of Respondent identified her by means of a photograph and one witness identified the adulterer W. G. N., by a handkerchief with his name branded thereon. The Bill passed.

## MARIE LOUISE NOEL'S CASE, SESSION 1887.

*Bill by the Wife against the Husband on the ground of Adultery and desertion.—Bill passed.*

Petitioner married R. L. J. on 19th April 1869 ; they lived and cohabited together for six weeks, when he refused to longer continue to live with her or to maintain and support her as his wife. They however met again in 1872, and cohabited together for one night, after which petitioner was finally abandoned. Respondent thereafter lived in a state of adultery with a person named in the evidence. Bill passed.

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## FANNY MARGARET RIDDELL'S CASE, SESSION 1887.

*Bill of the wife against the husband on the ground of his adultery and desertion.—Only one offence of adultery proven.—Custody of child.—Bill passed.*

Petitioner married G. F. H. 20 December 1871 ; they lived and co-habited together until January 1875, when he deserted her, and thereafter failed and neglected to provide for and maintain her. They never met again, The preamble charged that he had committed adultery with various persons, but there was no evidence of more than one act of adultery, and that with a squaw or Indian woman of bad reputation in June, 1878, to whose house he had been seen going on a former occasion. The Bill passed and Petitioner was also given the custody and control of the minor child, issue of her marriage with Respondent.

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## ANDREW MAXWELL IRVING'S CASE, SESSION 1888.

*Adultery of the wife.—Verdict in action of Crim. Con. against Adulterer.—Bill passed.*

Petitioner married Marie Louise Skelton at Toronto 31st August, 1885. In the summer of 1887 Petitioner engaged a house at Niagara for her and their infant child, and while there

Respondent formed an adulterous connection with one Smith, against whom Petitioner recovered a verdict for \$100 in an action of *Crim. Con.* About the time of the discovery of her infidelity by Petitioner, Respondent abandoned her home and infant and Petitioner never lived with her again. Bill passed.

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### MARY MATILDA WHITE'S CASE, SESSION 1888.

*Bill to nullify the marriage on the ground of non-consummation owing to alleged malformation of husband.—Evidence of Medical Examiners contradicts Petitioner.—Bill rejected.*

This was an application to nullify a marriage on the ground of its nonconsummation by reason of the alleged impotency or malformation of the Respondent. The bill also asked for a reconveyance to Petitioner by Respondent of certain real estate claimed to have been conveyed by her to him. Upon the opening of the case before the Select Committee, Counsel for the Petitioner abandoned this portion of case, stating that he found the evidence insufficient to support the claim.

The evidence of the petitioner showed that she had married Respondent in 1872, and that she had never had sexual connection with him owing to his alleged malformation or incapacity to consummate the marriage.

Counsel for Petitioner then informed the Committee, that following the practice observed in the English Divorce Court in cases of this kind, he desired an Order from the Committee requiring the Respondent to attend and submit himself to a medical examination, and he asked that two medical gentlemen be appointed to examine him. The Order was made.

Respondent being subpoenaed, attended and stated that consummation had not been possible for some time the first year, but that he had since consummated the marriage. The Medical experts examined both parties and reported verbally to the Committee that there was no malformation apparent in Respondent, and that the physical condition of the Petitioner was such as to contradict her statement that the marriage had not been consummated.

The Committee accordingly reported that the preamble had not been proved. In consequence of the peculiar nature of the case, the Committee were also of opinion that it must have been within the knowledge of the Petitioner that there was no foundation for her allegations against Respondent, and in view of there being no justification for bringing Respondent to Ottawa, they recommended that he be paid \$20.00 for his travelling expenses, and that the same be charged to the contingencies of the Senate. This ultimately came out of the \$200 deposited by Petitioner to cover the expenses of the case.

The Report was adopted and the Bill rejected.

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#### CATHERINE MORRISON'S CASE, SESSION 1888.

*Bigamy and Adultery of the Husband.—Evidence of cruelty.  
—Custody of Infant child.—Bill passed.*

This was the first case before the Select Committee on Divorce under the new Rules of Procedure. Petitioner was married to John F. Morrison, on 5th October, 1880, and of three children born to them, one survived. Respondent became intemperate and treated Petitioner with cruelty and violence. On 9th June, 1887, he deserted her and married Maria Sullivan with whom it was proved he cohabited and committed adultery. He was subsequently convicted of bigamy and sentenced to two years penal servitude.

The Committee amended the Bill by giving the mother the custody of the child, to make the Bill in accordance with the petition, the preamble and the evidence. In making the report of the Committee to the House, Hon. Mr. Dickey said, "It would be a cruel thing to refuse the mother the custody of her child seeing that the husband is a man of bad habits, and is actually in the Penitentiary—for bigamy." The Bill as amended was passed.

## W. H. MIDDLETON'S CASE, SESSION 1888.

*Alleged adultery of the Wife.—Report by Select Committee on Divorce to the House recommending favorable consideration by Divorce Committee for the next session, of the petition and Bill and of the preliminary steps already taken, the Bill not being proceeded with owing to prorogation of the House.*

This was an application for a bill of divorce by petitioner from his wife on the ground of her alleged adultery. The publication of notice expired near the end of the session, and the second reading and reference to the Select Committee on Divorce took place four days before the prorogation of Parliament. On the opening of the case before the Select Committee for the hearing of the witnesses, Counsel for both parties agreed that as there was not sufficient time left for the completion of the case it was desirable that further proceeding be deferred to next session.

The Committee thereupon decided not to hear the evidence, and in their report recommended that should a petition for relief in terms similar to those of the petition already presented in the matter, be presented by the said petitioner at the next session, such petition and any bill founded thereon for the same object as that of the present bill, and any application for dispensing with further notice, should receive the favorable consideration of any Committee to whom such petition and bill might be referred, in so far as related to the publication and service of the notice of application therefor and of the second reading of said bill, and of the said Bill; also that a copy of the Report certified by the Clerk of the Senate be served at least three months before the next session, upon the Counsel who appeared before the Committee on behalf of the Respondent, and be published by the petitioner in the *Canada Gazette*, for a period of not less than three months previous to next session; also that the sum of two hundred dollars (\$200.00) deposited by the petitioner be retained by the Clerk towards expenses already incurred, or which might be incurred during the progress of the bill at the next session.

The petitioner republished his notice of application as well as complying with the terms of this order.

## ELEANORA TUDOR-HART'S CASE, SESSION 1888.

*Bill by the wife against the husband on the ground of adultery.—Evidence of cruelty.—Circumstantial evidence of adultery before separation of the parties.—Adultery committed after separation.—Action by the wife in the Province of Quebec for Separation de Corps dismissed with costs.—Equal responsibilities of man and woman.—Extent to which practice and precedents of the House of Lords should be accepted and acted upon in Canada.—Bill passed, and custody of children given Petitioner.*

In this case petitioner married F. L. H. in 1871, and there was issue of the marriage, four children. Shortly after the marriage Respondent began absenting himself from his home and treating Petitioner and children with the greatest neglect. He made many remarks to her which a virtuous man would not make to a virtuous wife and which caused her to doubt his fidelity, and her suspicions were so much aroused that she resolved she could not further live with him. She then left him without actual knowledge of any act of his infidelity and continued to reside apart from him in a boarding house. On one occasion he told her that he was thoroughly bad, and that he respected her for leaving him. Being examined by Counsel as to other instances of his unkind treatment, petitioner answered :

“I have been treated with, what amounted to me, cruelty ; but I cannot say that I have ever received any actual violence, and although he at times had very violent fits of temper and would sometimes threaten people's lives and cursed his father terribly to me in private, he only once threatened me with violence, and then I ran away and he could not do it.”

Q. Did he use any impure language about others ?

A. At times his conversation was very much so. That was one thing that led me to suspect his unfaithfulness. He used to tell me so many stories of his experiences with women, and as years went on these stories increased, so I came to the conclusion that they could not all have been before his marriage, as he was only in his twenty-first year when he married..

Two witnesses testified to seeing Respondent in a house of ill-fame prior to his separation from his wife. Adultery subsequent to the separation was clearly established.

Counsel for Respondent obtained a direction from the Com-

mittee that Petitioner file an exemplification of the pleadings and reasons for judgment in an action for *Separation de Corps* brought by Petitioner against Respondent in the Superior Court of the Province of Quebec, which action was dismissed with costs as against her. This was filed.

The Committee reported the bill without amendment, and the bill was subsequently passed by both Houses.

Counsel for Petitioner : *J. L. Morris, Q. C.*, and *J. A. Gemmill*.  
Counsel for Respondent : *A. W. Atwater* and *Alex. Ferguson*.

In the debate in the Senate on the motion for the adoption of Report the opponents to the bill urged four objections to the Petitioner's application.

(1) That having failed in her action for *Separation de Corps* in the Province of Quebec, her application to Parliament for relief was a reflection upon the law of that Province, and brought it into contempt.

(2). That there was no evidence of adultery and cruelty prior to her separating from her husband.

(3). That having left her husband on suspicion only, and consequently without reasonable excuse, her conduct conduced to the adultery proved subsequent to separation, therefore she was not entitled to relief.

(4). That the practice and precedents of the House of Lords which the Parliament of Canada had followed in the past, afforded no instance of divorce being granted a wife for the husband's adultery only.

These objections were combatted by Senators Abbott and Gowan.

This case involved important constitutional and moral questions, and the views expressed by the members of the Senate who are members of the *legal* profession could not be very well condensed, hence the writer has determined to publish the substance of their speeches, from the *Senate Debates, 1888*, p. 598, as follows :

HON. J. R. GOWAN.—In dealing with bills of divorce the Senate is engaged in one of its most important duties. To sever the sacred tie of marriage is a serious act, and the most careful consideration of each case is incumbent upon us all. Not merely because of the operation upon the marriage *status* of the parties concerned,

but because Parliament, unlike a Court of Justice, is not tied by fixed limits, but may bring in view considerations of expediency or public advantage when making a law, may, and I think, should, have in regard the effect in relation to morals and the well being of society. With confidence, therefore, of being patiently heard, I desire to contribute my quota to this discussion. It may not be of much value, but I can at least say the subject has been carefully and anxiously considered. In the evidence appended to the report of the Committee, there is a copy of the exemplification of certain proceedings before the Superior Court of Quebec, District of Montreal. I venture to think it should not have been called for, but appearing, it cannot go unnoticed, as if now unchallenged it might grow into a dangerous precedent. I learn that the counsel for the respondent claimed and pressed for the production of this exemplification under the old rules 74 and 75 of the Senate. In my humble opinion they did not warrant any such claim, and the proceeding brought up was not contemplated by, or included in these rules. The practice under these rules, if founded on any legal principle, was in respect to the question of collusion or connivance, the production of the judgment recovered, etc. ; a sort of test that the petitioner had endeavoured to obtain the redress open to him by action at law. I do not present an argument at length on the point, for the rules are no longer to have force, and it would scarcely interest the House. I must say I am at a loss to know what purpose the Respondent could have in respect to the exemplification put in. The judgment of the court, it is true, was against the Petitioner. It cannot be contended however, that the judgment could bind Parliament, whether for or against the Petitioner, or in any way control its action in finding upon the facts or granting relief. The court below had no power touching *divorce* : that belongs under the constitution to Parliament. But there it is, and may lead to the notion that in passing the bill, we would be overruling the judgment of a court, or acting in opposition to it. Nothing could be more unfounded. I think it should not have been before the Committee, but as it has been reported, I deem it but respectful to make a few observations touching the matter. I for one do not for a moment challenge the correctness of the decision in respect to the subject matter dealt with under the law the court was bound to administer ; nay, more, I would feel strongly inclined to accept it with respect, as some aid to "the conscience of Parliament," if precisely the same questions with the same evidence which were before the Committee had been passed upon by the court below. But that we know was not the case. One or two prominent points of difference may be noticed ; they will be sufficient to illustrate the position. The law under which the court acted, and by which it was bound, may be



found in the Civil Code, namely, articles 188 and 189: 188—A wife may demand the separation on the ground of the husband's adultery, if he keep his concubine in their common habitation. 189—Husband and wife may respectively demand this separation on the ground of outrage, ill-usage or grievous insult committed by one towards the other. Article 188 only covers adultery by husband under particular circumstances, "if he keep his concubine in their common habitation." Article 189 possibly admits of judicial expansion, "grievous insult committed by one towards the other." It might perhaps be contended that it would include an act of adultery wherever committed. I do not say it would, and I do not find any case in the Lower Canada Reports in support of such construction. Indeed the only case I found under Article 188, is *Stark vs. Massey*. The decision in that case does not throw any light upon the general subject, and relates to statements made by the husband being admissible as evidence. The case between the parties to this bill was before a court with a specially limited jurisdiction—*Separation de Corps*—and limited in respect to matrimonial offences specified—a court limited as to relief and otherwise. It is not so in respect to bills of divorce before Parliament. In all such cases Parliament, to use the words of Lord Brougham, "is engaged in making a law," and as Lord Thurlow said in the Addison case, "governing ourselves by the exercise of our own wisdom and discretion." The hon. Senator from Ottawa in 1887 strongly expressed himself to the like effect, namely, that Parliament in such matters is governed only by individual judgment and opinion of members in each particular case. I took occasion last session also to express my opinion in this House as to the paramount power of Parliament in cases of this kind, but will not weary the House by repeating it; but I may add the views I expressed have since been endorsed by the highest authority in the country on Parliamentary law, Dr. Bourinot, the learned Clerk of the Commons. The Senate, as a constituent of Parliament, is possessed of this case, and Parliament I maintain in passing a law touching the *status* of the parties is not limited or restrained, any law it may deem in the interest of morals, and the good order of society. In this therefore it differs from the ordinary tribunals. Another material point of difference is this: No testimony given by a party to a suit can avail in his or her favour (Code, Art. 1232) in the Courts in Lower Canada, and neither of the parties to the bill before us were thus examined in the court below. The court would have no power to take their testimony. Before the Committee of the Senate there is no such restriction, and the petitioner did give evidence. The respondent though present, did not offer himself as a witness. In proceedings before the Imperial Parliament, and in suits before the Divorce Court, both husband

and wife are competent witnesses on bills of divorce and suits for dissolution of the matrimonial tie. In Canada they are admitted as witnesses in legislative proceedings, and the rule has been invariably acted upon. The new rules of procedure retain the principle re-cast in rule Q. Thus the court below had not, and could not have had, the benefit of hearing the parties on oath, but as I said before, the Committee of the Senate in making inquiry is not so crippled in the endeavour to reach the whole truth. And I venture to express the belief that if the evidence which was before our Committee could properly have been before the court below and entered into judicial consideration the finding upon the facts would not differ—at least that is my impression. I might further illustrate in this direction, if necessary, not that I deem the action of the court any obstacle to the power of our making a law under the constitution but to show that relief granted to the petitioner upon the evidence before us would present no conflict of decision such as there actually was, however, between the action of Parliament and decisions of the Superior Courts of Upper Canada, and that upon purely legal questions, since Confederation. The limit of authority and duty of a court of justice in deciding a contest between parties and that of Parliament in legislation, which may determine the *status* of parties or otherwise, is essentially different, and I for one have found in the facts, reasons against establishing a divorce court. In the enquiry before the Committee I learn that it was urged there was no proof of adultery by Respondent till after the Petitioner departed from her husband, and it was contended this was a sufficient answer under old rule 84 of the Senate, which says: "In all unprovided cases reference should be had to the rules and decisions of the House of Lords." The contention I learn was that this rule makes it obligatory upon us to follow the principles recognized, and some times acted upon, in the House of Lords in respect to granting or withholding relief upon bills of divorce. This seems to me to be an entire misconception of the scope and object of rule 84, which relates solely to practice and procedure, and is on its face merely directory. A rule having the substantial effect contended for would be bad and would be out of place in "Rules of Proceeding." Under the Constitutional Act of Canada, Parliament has no restrictions, and none can exist except as imposed or enacted by Parliament itself. The Senate and the House of Commons can each regulate its own procedure, but neither body nor both bodies together could diminish or control the substantial action of Parliament, or the constitution would be at an end. In shaping action or legislation on a bill of divorce upon facts in evidence before us, we naturally look to the House of Lords hoping for light, and to see what others have done in cases similar to those in which we are called upon to deliberate

and act. But we have never bound ourselves to accept their decisions as authoritative and conclusive. We follow "precedents" where they commend themselves to our judgment and we decline to follow them where they do not, and rightly so, for the decisions of the House of Lords on bill of divorce have not the weight that attaches to the decisions of the regular legal tribunals. The majority determines, and in the minority, on a vote, may be found men of learning, wisdom, and experience expressing opinions, adverse to the determination, more in accordance with the eternal principles of truth and justice. The "Precedents" in the House of Lords reach back for some 200 years, from 1858, when the Divorce Court was established. These precedents abound during times not conspicuous for purity in social life, or when legislation exhibits any marked effort for promotion of morality. The manners and customs, if not corruptions, of classes fashioned opinion, and the higher moral tone and the controlling power of the healthy public opinion of modern times was in those times little known. In legislative dissolution of marriages, the provisions of a divorce bill were, however, in the discretion of a majority, which could adapt them to particular cases and enact as to the majority seemed meet. I must say one does find old cases before the House of Lords where it is difficult to reconcile the decisions with Christian ethics and occasionally some indications appear of notions and sentiments (due probably to a highly artificial condition of society) not in unison with our simple common sense views of right and wrong. We never have accepted the "Precedents" of the House of Lords in matters of substance as our rule of right nor are we bound to follow their action or shape our decisions to square with theirs. We have our own to refer to and eleven of these are at the suit of women. The cases referred to before the committee, it was argued, were "precedents" showing broadly that adultery committed after separation of husband and wife would not support a bill of divorce by wife for that cause. After examining the cases I am unable to arrive at that conclusion. There are "precedents" it is true, but particular circumstances have been allowed to modify. The strongest case cited could I think, be plainly distinguished from the case before us, in facts, circumstances and other elements. I do not propose to trouble the House by going into a dry examination of the kind (none of the House of Lords' cases were within the last fifty years). I have referred to the point because one, if not two of my honorable friends, though strongly convinced of the moral right of the Petitioner to relief, feel pressed by "precedents" in the way, they feared, of granting it. The "precedents" of the House of Lords referred to are anterior to 1857, when the law was changed and thereafter regulated under statutory enactment, providing for the establishment of a divorce court. In looking at these "preced-

ents," the difference between the legal and social condition as well as public sentiment in England and in Canada must be taken into account to be of any assistance in guiding discretion. And with permission of the House I would make a few brief remarks in this connection. With respect to divorce in England one is struck with the marked, and I must think unjust, discriminations made between the sexes in respect to matrimonial offences, and the prejudices which existed, and still exist, against equal right of relief to the woman as well as the man. They have been much modified in recent times, it is true, but they yet remain and find expression in the statutes. I am not aware of such prejudices ever existing in Canada, not in Ontario at all events, and I can find no indication of such in the several Divorce Acts of the Parliament of Canada, but the reverse, as an examination of our precedents and the grounds upon which Divorce Acts were passed, as set forth in the preambles, will clearly show. The subject of divorce passed to the Parliament of Canada, in the distribution of legislative powers under the constitution, absolutely and at large. Looking to England, we find that according to the practice of the Imperial Parliament at one time, divorces were granted only at the husband's suit—the first relaxation was, I think, not till 1801. It was a flagrant case, but the wife's bill would have been rejected had not Lord Thurlow supported it with his high authority—and no little skill, for he had no authority to refer to, and perhaps was content to use any argument to promote the cause of justice—and so strong were the prejudices of the age that Lord Eldon, taking his stand on precedent, was at first prepared to disregard the wife's claim for relief, but in the end gave way as "he was satisfied that the divorce asked for under the special circumstances should be granted." Another ex-Lord Chancellor, Lord Loughborough, admitted the objections to the bill were in a great measure removed by Lord Thurlow's speech, but the Duke of Clarence opposed the bill solely because of the Petitioner's sex. The bill passed and became law, but another woman a few years afterwards was not so fortunate. Her bill for relief was opposed by the Bishop of St. Asaph. The husband had been guilty of the most shameful profligacy, and as His Lordship observed, "under no sudden impulse of passion, but a deliberate abandonment of an able and deserving wife," but the Bishop nevertheless thought "on public grounds the bill should be rejected." This was in 1805, and is one of the set of "precedents" we are invited to follow. A more objectionable decision, bottomed on precedent, it would be hard to conceive. The Rt. Rev. Prelate, however, carried his motion for the "hoist," but by a bare majority of 3. Strange decisions have been given there. More than 100 years before a divorce was granted "to continue the succession of peerages in the male line." It stands a "precedent" in the House of

Lords. In 1817 there is a case which shows the marked prejudice against the woman. Gen. Dyot had obtained an Act of divorce in the previous session; his late wife promoted a bill expunging certain words inadvertently left in the original Act affecting the marriage settlement. On reference to the Chief Justice of the Common Pleas, and one of the Justices, they reported that, "it was just and reasonable the mistake should be corrected." In committee, however, words were introduced so injurious to her character that she prayed to be allowed to withdraw her bill. General Dyot asked that it should proceed as altered, deciding for the divorced husband in the dispute. The Lords refused to let the bill be withdrawn. The case of Mrs. Dawson, in 1848, is equally significant. Her husband's adultery was clear. He had frequently whipped her, at times with his horsewhip. She ought undoubtedly, to have obtained a divorce from her wicked and cruel husband, but the Lords rejected her bill on six occasions, because, in their opinion, it would "tend to relax necessary safeguards." Indeed, till very recently a woman's bill had slender chances of success, though it was never actually denied that, in exceptional cases, a wife would be entitled to relief. But "the tone of sentiment" amongst those she had to appeal to was largely hostile. In time a better and purer feeling was awakened, and in 1832, I find Lord Eldon supporting a bill promoted by Mrs. Moffat, changing his opinion in spite of his admiration for precedents. He used language that must have grievously wounded the ears of my Lord of St. Asaph, if within hearing of his voice; and shaken many a venerable precedent. Lord Eldon is reported to have said, "he had yet to learn that a woman had not as good a right to relief as a man under the circumstances, which gave rise to bills of this description." With a view to redress the crying injustice of the divorce law a Royal Commission was issued in 1850. A report was submitted in 1853, a bill for the establishment of a court of divorce was introduced in 1854, which allowed dissolution of marriage to a husband for his wife's adultery, but not to her for his adultery. It met opposition and was abandoned. In 1856 a similar bill was introduced, but with a provision allowing divorce to a wife where husband was guilty of incestuous adultery. This bill was amended in committee, but afterwards abandoned. In 1857 for the fourth time a bill was introduced which afterwards became law. When the bill was before Parliament, strenuous but ineffectual attempts were made in both Houses to make the right of divorce given to wives correspond more nearly with the husband's right to a dissolution of marriage. At the instance of Lord John Manners, with the concurrence of Lord John Russell, the Commons inserted a clause giving the wife divorce when her husband "committed adultery in the conjugal residence." When the bill returned to

the Lords, this provision was cut out, notwithstanding the support of Lord Chancellor Cranworth. Mr. Gladstone, also, though he strongly opposed the Act of 1857 was of opinion that, if divorces were granted at all, it should be on the principle of equal justice to both sexes. Lord Lyndhurst also proposed amendments in the Upper House, endeavoring in vain to extend the wife's power of obtaining divorce on her husband's adultery: With four other peers he protested against the bill because, among other reasons, "the relief given to the wife is 'partial and unjust' as contrasted with that afforded to the husband; because no distinction is made in Scripture between the offence of the man and of the woman; because 'the whole tendency and spirit of the Christian religion is manifestly calculated to raise women to equal rights and equal responsibilities with men.'" And the eloquent words of Mr. Gladstone, speaking upon the bill, must bring conviction to every unprejudiced mind: "For my own part I shall always assert the principle of equal rights. It is impossible to do a greater mischief than to begin now, in the middle of the 19th century, to undo, with regard to womankind, that which has already been done in their behalf, by slow degrees, in the preceding 18 centuries, and to say that the husband shall be authorized to dismiss his wife on grounds for which the wife shall not dismiss the husband. If there is one broad and palpable result of Christianity, which we ought to regard as precious, it is that it has placed the seal of God Almighty upon the equality of man and woman with respect to everything that relates to these rights: and I will offer the utmost resistance to any attempt to induce this House to adopt a measure which, I believe, would lead to the degradation of woman." Ah! these are grand and noble sentiments worthy of a Christian statesman. Who could hear them unmoved? But prejudices prevailed, and the partial and unjust provisions towards the wife were retained (1). Thus up to the last moment the legislative power of the Lords could be exercised

(1) It is now more than thirty years since this great struggle to secure the recognition of equal responsibilities as between man and woman, in the debate upon the Divorce Court bill; the principle never found acceptance in legislation, or a place in English jurisprudence. England's noblest orators and statesmen then, in vain contended for some modification, but the majorities of the Lords, temporal and "spiritual" and Commons were adverse, and partial and unjust provisions towards the wife were retained.

In Canada, as Senator Gowan, pointed out, a better sentiment always

prevailed; relief was not denied the woman, as several acts since Confederation show: and when the question came squarely up, and a distinct issue was raised, whether a woman had not as good a right to relief as a man upon adultery proved, a decisive vote emphatically re-affirmed the principle of equal responsibility of man and woman touching the matrimonial crime. It is worthy of note that within less than two months thereafter the great Conference at Lambeth of "Archbishops Metropolitans and other Bishops in full communion with the Church of

in granting divorce in England, we see a narrow and unjust sentiment prevailed on this subject. Outside of mere procedure, could we look for pure light in the "Precedents" they established, much less broadly accept them as our rule of right? Though a divorce court has been established for England, Parliament still entertains bills of divorce in Irish and other cases. I notice but one application by a wife has been before Parliament since 1857. An Irish lady the year before last obtained an Act of Divorce from her husband, a coarse drunken brute, from whom she had suffered many cruel indignities, and against whom adultery was proved. An Act was passed to dissolve the marriage. I refer to this case as showing a healthy change in sentiment; for thirty years ago under the rules of the House of Lords her application for relief would have been promptly rejected. The author of a recent book on Private Bill Legislation (1887) remarks on this case: "According to former precedents the cruelty and adultery proved in 1886 would have been wholly ineffectual to procure a private divorce Act. But in this instance the House of Lords exercised its old jurisdiction in the spirit of the legislation of 1857." Indeed only in four cases before the case of 1886 have divorce Acts been passed on application by women. The feeling was against them and reform moves slowly where manners and class influences largely mould lines of thought. As a Canadian I rejoice that a different and a better sentiment prevailed here. The Parliament of Canada since Confederation (1867) has passed some 30 divorce Acts; eleven are in favour of women whose husbands were proved to be guilty of adultery, and of the eleven some seven were cases in which Acts for the dissolution of marriage could not have been obtained if the principles and precedents acted on in the House of Lords had been entertained and acted upon by the Parliament of Canada. We never, I repeat, accepted them as our rule of right, and we have not followed them. Part of the Empire—in confederation under a common sovereign—yet with a constitution similar in principle to that of the United Kingdom, we Canadians have the making, moulding and developing of the law,—the recognition or rejection of principles which shall prevail in our community, and to us it belongs exclusively to enact

"England, assembled from divers  
"parts of the earth," passed upon a  
number of practical questions, amongst  
them marital relations: and the judg-  
ment of this Conference, with a sol-  
emn protest "against any lowering  
"of the sanctity of marriage," pro-  
nounced "that there is no difference  
"between man and woman in the  
"sinfulness of sins of unchastity,"  
declaring "that on man, in his God-

"given strength of manhood rests the  
"main responsibility."

Such sanction therefore as the sol-  
emn declaration of the venerable  
body assembled at Lambeth can  
lend, our action has secured, and,  
in this particular at least, the Parlia-  
ment of Canada, the most important  
colony in the Empire, has shown  
England a better and a purer way.

and declare as a Parliament in all that concerns the welfare and good government of Canada ; one iota of this power, I for one, am unwilling to surrender or abate. I would again emphatically reassert the position that we are not restrained in our action under the British North America Act, for we have not imposed any restrictions on the exercise of our power in making a law touching divorce. We act according to our "wisdom and discretion" upon the facts and circumstances in each case, and in legislating consideration of what is just and what will best guard public morals and the interests of society must ever be our guiding star. I was anxious to go somewhat fully into the subject, for so far as I am aware, some of the grounds I have touched upon have not before been discussed. Precedents in the House of Lords before the formation of a divorce court, 1857, go to establish these propositions : 1st. That a husband aggrieved only by adultery might obtain a divorce almost as a matter of right. 2nd. That a wife had no title when she is aggrieved only by adultery. 3rd. But that the provisions of a divorce bill being in the discretion of Parliament, that Parliament might mould and adapt its relief according to the exigency of the case, and take care that justice was done, its power being supreme. If there be no precedent to fit the case now before us and be followed, the facts in evidence justify us making one in granting the relief asked, and every principle of morality and justice appeals us to declare that relief should be granted to a woman under circumstances such as these. The preamble of the bill in this case reciting the petition sets forth the facts and the prayer for the dissolution of the marriage of the petitioner and respondent. The Committee find she has proved the allegations of her petition and established the adultery charged. The evidence before us abundantly shows that finding just and right. I do not propose going through the unsavory details. I will notice only one or two points which struck me in considering the evidence. If we permit ourselves to look at the exemplification at all, in connection with the statements made by respondent's counsel, what does it disclose? This ; that the petitioner and respondent were parties to a proceeding in the court below, wherein adultery was charged against the respondent. The respondent was, therefore, apprised of such a charge, and might well conclude that in the application to Parliament for divorce, like evidence would probably be adduced. His character was at stake, none could know better than himself what passed between him and his wife, what she could testify and would before Parliament have the right to testify, what witnesses might speak to, and yet he has not attempted to impeach the testimony or explain away, if he could, the statement of facts, and the inferences from them. The respondent was present during the whole enquiry before the Committee ; he would have been willingly



heard, I have no doubt, but he did not offer himself as a witness. I cannot understand the position of a man under such circumstances, challenging facts or denying the correctness of reasonable inferences from them and hoping his mere denial would be accepted. The petitioner in her evidence speaks of facts, conduct and language used between her and the respondent, between them both, and which could be only known by them. Has she spoken the truth? If not why did he not go in the witness box and deny or explain if he could. He had the assistance of able counsel, but he did not offer himself as a witness. In my mind this can lead to but one conclusion. He could not on oath contradict what his wife testified to, or deny the facts and inferences from the facts in evidence. What reasonable mind could accept bare denial under such circumstances. I think we should be prepared to accept *prima facie*, as correct, the finding of the body the Senate specially appointed to make the enquiry; their verdict on the evidence is properly entitled to great weight. I do not find the evidence of the petitioner shaken in any material point under a severe cross-examination. The committee were favourably impressed with the manner in which she gave her evidence, at all events she was believed by the committee and they have reported accordingly. Another point; the evidence of a witness who would seem certainly not to be a willing one against the Respondent, shows that some years ago and during the time the parties were living together as man and wife, the Respondent was met in a house of ill-fame coming out of room in which the gas was turned down. He was going out at the time the witness was going in; and the fact of being there at that time is corroborated by one of the unfortunate women who was an inmate of the house. She knew the Respondent having seen him on several occasions in houses of ill-fame where she was. And he seemed to know the girls of the house "the same as any person else that came in." It will be borne in mind the house was in his own city. For what purpose are such houses visited by men such as the Respondent? What was his purpose in going there? If it was any honest purpose, not a guilty purpose that brought him, why did he not go in the box and exculpate himself? If he did not on that occasion commit an act of adultery, why did he not deny it on oath? I say the conduct of the Respondent on this occasion in connection with other facts proved, would have been fair evidence of adultery to go to a jury from which they might not unreasonably draw an inference of guilt, and that a court would not feel bound to set aside their verdict. Are we to give less weight to the verdict of our select jury, so to speak, chosen from our body? It would be but to beguile common sense if when men's actions point to but one conclusion, a mere technical denial was accepted against it. Direct evidence

of acts of adultery is rarely practicable and is not required. Lord Stowell, in his judgment in the case of Lovedon said : " It is a fundamental rule that it is not necessary " to prove the direct fact of adultery ; because, if it was otherwise, " there is not one case in a hundred in which the proof would be " attainable. In every case almost, the fact is inferred from circum- " stances that lead to it by fair inference as a necessary conclusion ; " and unless this were the case, and unless this were so held, no " protection whatever could be given to marital rights. What are " the circumstances which lead to such a conclusion cannot be laid " down universally ; because they may be infinitely diversified by the " situation and character of the parties, by the state of general " manners, and by many other incidental circumstances, apparent- " ly slight and delicate in themselves but which may have most im- " portant bearings in decisions upon the particular case. The only " general rule that can be laid down upon the subject is, that the " circumstances must be such as would lead the guarded discretion " of a reasonable and just man to the conclusion. The facts are not " of a technical nature ; they are facts determinable upon common " grounds of reason ; upon such subjects the rational and legal " interpretation must be the same." Then as to another point. Several after acts of adultery were proved by women of ill-fame (*particeps criminus*). The women who bore this testimony were certainly living in sin, but they were competent witnesses, and though living an immoral life, it does not follow they would perjure themselves, their character for veracity was not impeached. The committee was able to form an opinion as to their credibility, and they were believed. They seem to have been unwilling witnesses. In such a case as this, resort to some such evidence seemed of necessity, for "*in re lupanari testes lupanares admittuntur.*" From the statements of the Petitioner on oath not contradicted, and in view of other facts in evidence, I say the Petitioner was right in leaving such a man. She could not with any self-respect continue to live with him as his wife. There is ample proof of his adultery, and nothing in her conduct to deprive her of the relief she asks, to be separated from a man living a disreputable and sinful life. She left him, it is true, at his brother's house (he had no establishment or home of his own), but not without good and sufficient cause. Why did the wife leave her husband ? A valid answer may be found in the evidence. The longsuffering, neglected wife had her suspicions for years ; they kept growing upon her. She evidently fought against them ; she made up her mind slowly, she says. At last her suspicions ripened into conviction of her husband's infidelity to her. When her mind was made up she left him. This was shortly after the birth of her youngest child, and I think anyone who fairly considers the evidence must be convinced that she could come to no other conclusion, and

that it was a duty to leave him. I do not care to refer to the condition of her bodily health, and what it suggested, but look at the gross neglect of her husband for years, the neglect of his children which she tried to hide from the little ones, the fact of his staying out night after night, till finally it became the exception when he stayed at home. The remarks and admissions he made, the stories he told of his experiences with women, the gratuitous remark that he was a thorough blackguard, that his life just suited him, the vile thing he said to his wife early one morning on awakening, did she not rightly consider all these as showing his unfaithfulness, and reasonably conclude he was leading an evil life and would continue to do so (and that he was actually doing so up to a fortnight before the hearing one of the unfortunate women examined proved)? Who then could say she was wrong in leaving him? No virtuous woman could act otherwise. It was a duty to leave him. As he said to her himself it was the only thing she could do. Why does he resist the relief sought? Why does he fight inch by inch? Why does he try to down the imploring cry for relief of the woman he has wronged? I know not his motives. I cannot think they spring from a roused conscience, or the remains of a lingering affection. Is his nature incapable of seeing that no right minded woman could condone conduct such as his—even if she could forgive? What should we be doing then if we refused to pass this bill? What but saying to a virtuous woman: "You are to remain to your life's end under the dominion of a profligate man who could only desire to retain his hold for unworthy purposes." Under the dominion of a shameless man, who uncovered his evil doings to his wife and flaunted his impurities in her face! Is the maintenance of a decent society, the preservation of purity in family relations a matter of slight concern—are we to allow mere technical regulations, if they exist, to block Parliament in making a law, in the interests of morality, and for the relief of an outraged wife? Will the Senate of Canada affirm by its decision that adultery may be practiced with impunity by husband and father in our Christian community, in the midst of our Christian homes? Honorable gentlemen, there is but one alternative, we must either allow the proved adulterer to go forth triumphing in the impunity given to a vicious course of life, or we must free this woman from a relation which can now have no sanction before a pure God, and from which she is entitled to be freed by every law, human and divine.

HON. MR. DICKEY—The hon. gentleman from Barrie has announced his doctrine upon this subject, and he says in the course of his speech, that we are not to be governed by the principles which obtain in our great prototype the House of Lords; yet with singular inconsistency my hon. friend has been citing precedent after precedent which has been decided in that very

body, and very properly, and I may say with regard to that, I do not know that I should have made any observations on the question at all, but when a gentleman of legal training and very large legal experience propounds such a principle, it rather startled me, and I was very glad to find that in practice he does not follow out the principle he lays down for others, because he has cited precedents, and he is quite right in doing so, to carry out his own views whether for or against the Bill. My hon. friend says that the decision given the other day in Quebec upon this very question, a decision upon the same issue, upon the same evidence, except with regard to the woman, as to which we know nothing except what has been stated in the Committee on the one side, and the hon. gentleman from Midland on the other—but substantially on the same evidence, he says that these two decisions do not conflict, because they were upon entirely different questions, and in that respect my hon. friend is right because one was a question of separation from bed and board merely, and the other is for a total separation. Practically my hon. friend's contention is this: that although the evidence was not sufficient to warrant the judge in giving a separation from bed and board, yet it is sufficient to give the higher measure of relief—a total separation from the bonds of matrimony.

HON. MR. GOWAN—My hon. friend will allow me to correct him. I did not make the assertion he supposes. I alluded particularly to the qualified jurisdiction of the court below; for the Code says that a wife may demand separation in regard to the husband's adultery if he keeps his concubine in his house. I ventured to show the distinction between that case and the case which is now before us.

HON. MR. DICKEY—But the hon. gentleman stated distinctly there was another cause for that separation, any grievous insult which was given to the wife; and he knows perfectly well that that was ground for that judge to go on.

HON. MR. GOWAN—I stated also that there was no case of that kind in Lower Canada.

HON. MR. DICKEY—Yes, in the Code of Lower Canada that is one of the provisions. While upon that subject let me read exactly what the judgment of the Court says with regard to it. It is given in the form of considering that so and so is the case. Now what is the language of the judgment:—

“Considering that the adultery on the part of the husband not  
“accompanied by this aggravation cannot authorize a *separation de*  
“*corps* unless it constitutes by its publicity and by the other circum-  
“stances under which it has been committed a grave insult to the  
“wife. Considering that in the present case no act of infidelity in  
“the conjugal habitation has been alleged or proved against the  
“defendant. Considering that it does not appear from the evi-

“ dence adduced that the defendant, prior to the desertion by the plaintiff from their conjugal domicile, in the autumn of eighteen hundred and eighty-four (1884) had rendered himself guilty of adultery or of any act whatever committed under circumstances which constitute a grave insult to the plaintiff.”

The judge knew perfectly well he had no power, if this evidence was to be believed, that if there had been grievous insult prior to the desertion of her husband she was entitled to relief, but he says he does not believe it. But he continues :—

“ Considering that the acts of infidelity and even the acts of adultery committed since the said date by the defendant, even supposing them perfectly proved (which is far from being the case) have not the same force which they would have had if the plaintiff had not herself previously abandoned her husband and had not refused to return to his domicile in spite of the solicitations which he had made to her ; that under these circumstances plaintiff has only herself to blame for what has happened ; and for the failings of defendant.”

“ Considering further that these acts have not had publicity in themselves, and have not been accompanied by circumstances which would give them the nature of a grievous injury ; that it is only the proceedings of the plaintiff herself and of her agents and attorneys which have given publicity to these acts which otherwise would have remained secret ; that in setting spies upon the defendant and in causing his private life to be searched into by people without credit or reputation, and by spies and detectives of low position, and by publishing the result of these enquiries for the purpose of creating a judicial scandal, which has been sedulously taken up by the public press, the plaintiff her agents and attorneys have succeeded in giving considerable publicity to these acts of the defendant, and are themselves responsible for the notoriety which has resulted therefrom since the commencement of the litigation ; and considering that when the plaintiff instituted her action she had not even then obtained the doubtful proof which she has since been able to procure through the methods already indicated and condemned.

“ Considering that the plaintiff has in no way established by proof her other allegations of outrage, ill-usage and grievous insult, and has no right to obtain the conclusions of her complaint, doth maintain the defense and dismiss the plaintiff's action for all purposes of law, with costs.”

That is the judgment of the court. It is founded on common sense. It addresses itself to our common feelings and it is directly in line with the decisions of the House of Lords which I do not wonder that my hon. friend shrinks from quoting here. I suppose we may start with this consideration : it is contended on

the part of some gentlemen that this question is to be decided as a mere matter of feeling—as a mere matter of sympathy—that we in our sovereign pleasure as a constituent branch of Parliament are to decide this question just according to our own feelings and without reference to precedent or to history of divorce cases in other places. I think we should decide it in such a way that it may be fairly quoted hereafter as a precedent. I think the hon. gentleman from Barrie will agree with me in that position at all events, and in doing so, how are we to act? We have the whole jurisdiction of the Parliament in this matter, based upon a single word—one single word in the Confederation Act, and that word is “divorce.” We have hitherto proceeded, in legislating upon that subject upon the lines which we found prepared for us by our great prototype, the House of Lords. We have constantly had those decisions quoted to us, and we have been as constantly guided by them. Now, what is the principle with regard to them? The principle is, in England, as I hope it is here, that no separation a *vinculo matrimonii* shall take place unless adultery has been committed. I hope that will ever be the governing principle here. And what is the other correlative principle connected with that? That it is a good ground for the separation of the wife from the husband, but the two cases stand in an entirely different position inasmuch as it is not of itself pure and simple a ground for separating the husband from the wife. The rule upon that subject is laid down distinctly in this way, and by an eminent judge whose authority I am sure my hon. friend will accept—no less than the late Lord Chancellor Eldon, who says (*m*):—

“I must retain the opinion that upon application of the wife  
“on adultery of the husband for a divorce, the application resting  
“on that simple and distinct ground, ought for the sake of securing the morals of the public to be resisted and refused.” That is when it is on the sole ground of adultery. He adds:—  
“It is to be considered that the adultery committed by the wife and the adultery committed by the husband are entirely different in their consequences. The adultery of the wife might impose a spurious issue upon the husband.” That is the reason of the distinction given, and I apprehend there is no person will question the soundness of that reason. In another case, that of Mrs. Teush, a case decided by the same eminent judge who stated in language almost as strong as has been used here to-day, that he never recollected a more favorable representation given by a woman, but yet on general grounds of public morality, he felt it to be his painful duty to give the negative to the original motion, and he moved that the Bill be rejected, and that was carried.

HON. MR. GOWAN—Will my hon. friend allow me to remind him what the Bishop of Asaph stated in that connection. His ground was that it might injure the woman's position with respect to obtaining alimony in the court.

HON. MR. DICKEY—I am quoting from Macqueen's Practice of the House of Lords, page 604 and the comment of the author of that work is this :—

“The fate of this remarkable case strongly exemplifies the “disinclination of the Legislature to countenance or encourage “Bills of Divorce at the suit of the wife. The merit of Mrs. Teush's claim—was in some case weakened by her delay in making the application.” As it is here—because she has allowed a couple of years to elapse before taking any step at all.

HON. MR. GOWAN—You will find on page 603 what the Bishop of Asaph said. He said :—“He could not understand “how the lady's circumstances would be improved by a dissolution of the marriage, which would involve the loss of the alimony, awarded to her by the Spiritual Court. The Right Rev. Prelate concluded by moving that the Bill be read a second time that day three months. The Earl of Carnarvon dissented “from the Right Rev. Prelate. He thought the circumstances of “the case ought to induce the House to assent to the Bill.”

HON. MR. DICKEY—If my hon. friend refuses to recognize the authority of the House of Lords, I suppose I may be excused for not taking the dictum of the Bishop of Asaph, or accepting his peculiar views on this subject. I am taking the decision of the House of Lords, and the grounds on which the Lord Chancellor gave his decision. There are cases however, where the wife can get relief for the adultery of her husband, and what are those cases? They are cases where the Respondent is guilty not only of adultery but of cruelty and desertion of his wife, That is the principle laid down by the English precedents we have, and if after that she is obliged to separate from him and goes to her father's home, and he, after that, commits adultery, then it is considered she is entitled to relief because she had a sufficient ground for leaving him. It was not a desertion in the proper sense of the word ; but simply that she was forced to leave him by his cruelty and violence and in this decision the legal definition given to that cruelty and desertion is this, that it should be such as would enable her to get a separation from bed and board. It must be of that description altogether apart from adultery, before she has a *locus standi* in any court of England, or before the Imperial Parliament, that we are told now we are to pay no respect to, before she can secure a divorce. That is the law, and she has no case at all until that is done, and after that she can prove adultery and get relief. There is another case where she can get relief at once, and that is in the case where the

husband not only committed adultery but incest by committing that adultery with his wife's sister, whom he could not marry. I refer now to another case to show the obstacles that are thrown in the way of the wife obtaining such a divorce and to show the distinction that is made between the two cases. That is a very singular case, a very hard one indeed, the case of Mrs. Moffatt. She married in 1819 (see page 658 of Macqueen's Practice) the husband dissipated and committed adultery on the night of the marriage. A child was born in 1821. He kept his debauch up and the wife returned to the father's house and applied for a decree of separation, in the Spiritual Court. There was no opposition to the Bill, but Lord Brougham opposed the measure and it was rejected on a vote of sixteen to nine in the House of Lords. Then there is another instance in which the wife may get relief in which the husband commits bigamy—marries another woman. These two exceptions prove the rule, that the wife's position is entirely different from that in which the husband stands. Now we are not trying this case by declamation. Let us see the evidence and see what there is to justify the wife in leaving her husband. Was she treated with violence? Was she treated with cruelty? Had she nothing to eat? There is evidence here distinctly that her husband paid the bill for their board in his brother's house. I have no doubt it was out of her money, and you may call him a rascal for doing so, but she is not entitled to a divorce because he spent his wife's money. The point is this: she not only left of her own accord but without his authority. She did more—when he went, as a husband ought to do, and asked her to return she refused to return. The evidence is to this effect :—

Q. "I ask you to say yes or no, did he ask you to return  
"and live with him? A. He did. Q. Did he write to you  
"after you left Montreal? A. He did. Q. Did you reply to  
"those letters? A. I considered that he had no right to write  
"to me. Q. What did you say in that reply? A. I said that any  
"further communication between us would have to go between  
"lawyers or something to that effect."

Here we are asked to decide this question upon sentiment and sympathy, and this woman says: "I decline to have anything more to do with you; you must consult my lawyer." She is asked again "did you refuse to return to him or reply to his letter?" and her answer is "I refused to reply to his letters any further." Now that is the evidence that she gives. Then she is asked by the Chairman in another place with a view of finding out whether her husband had treated her with personal violence or in any way that would justify her in leaving him: "Q. Did he ever illtreat you? A. I have told you that I have received no personal violence from him, but I have received some very



unkind remarks." This does not stand alone, because this evidence of the wife as to the treatment she has received is confirmed by another witness who certainly must be considered an impartial one—I allude now to the testimony of the Respondent's brother, and next to the testimony of Annie Boyle.

HON. MR. MACDONALD (Midland).—I would like to call the hon. gentleman's attention to a portion of the evidence on the first page, since he has made a great point about her leaving her husband :—

"Q. Was there any particular reason for your residing there " at that time and not in a house of your own? A. Yes, he had " no home to offer me. Our house which was next door was let " at the time, and he had no business and no home to give me."

HON. MR. DICKEY—That is one of the objections. No doubt my hon. friend is perfectly right to call my attention to it; I intended to speak of it myself. That is the first objection she had to the man, that he had not money enough to buy a house to live apart from his brother and father. That is the secret at the bottom of the whole thing, and she went on and brooded over that and got into a condition—not that I profess for a moment to justify her husband in keeping away from her—that as the Respondent's brother and others say the home she speaks of, which was the only home he had was made so unpleasant that he had to go out for company, and he went to the St. James' Club to play cards. I hope that is an uncommon thing, but at all events it is not an unknown thing.

HON. MR. GOWAN—Will my hon. friend think I am pressing him to much if I call his attention to an opinion of Lord Eldon, in the year 1832—an opinion directly the opposite to that cited by my hon. friend from the same authority.

HON. MR. DICKEY—I do not propose that the hon. gentleman shall have another speech in the middle of mine.

HON. MR. GOWAN—I do not want to make a speech, but I desire to prevent my hon. friend from falling into an error.

HON. MR. DICKEY—Annie Boyle, who was a house-keeper where these people all lived was examined as to the terms on which these people lived, and her evidence is as follows :

"Q. On what footing did they stand? A. They seemed " to be on the kindest terms any time I saw them. Q. How did " Mr. Hart treat his wife? A. In my presence I think the kindest that I have seen men treat their wives. Q. How did she " behave and act? A. She was kind to Mr. Fred, and if Mr. " Theodore or Mrs. Theodore would say anything, I would hear " her frequently taking his part in Chestnut Hall. Q. What was " Mrs. Frederick Hart's disposition and character and behavior " toward her husband? A. In my presence they were always " kind to each other. I never saw her unkind to Mr. Fred nor " Mr. Fred unkind to her."

This is the person whose violence towards his wife has been spoken of ! One of the charges made against the respondent was that he took no interest in his children, yet we find the following in the evidence of this witness who lived seven years in the house.

“ Q. Do you know whether Mr. Fred Hart was fond of his children ? A. Very fond of them indeed, as far as any person from outside could see. Q. Did he appear to treat them as a father should treat his children ? A. For anything that I saw of him, I saw him treat them well.”

The brother confirms that, as hon. gentleman will see if they think proper to consult the evidence. He is asked distinctly : “ Did you ever hear any complaint from her as to the treatment she received from her husband ? ” He is the brother-in-law and knows all about the difficulties between them. He says “ No, I heard no objection that she ever made except his staying out at night and playing cards.” That is the whole trouble. It is most unfortunate that he should have done so, because it led to this unfortunate woman leaving her home and, in the language of the law, to conduce and contribute to that man’s falling after she had so left him alone to take care of himself. Under these circumstances, she had a different course before her. If she had any cause for desertion, such as beating, violence, cruelty of any kind, she could have complained and found a remedy. She could have applied to the court for a separation from bed and board. She would have been entitled to it, but she did not do that. This thing drifted on until, being separated from his wife, he got into bad habits. It has been said, and there is no doubt about it, that there is proof of adultery in 1886 and 1887. I have no manner of doubt of his guilt. The judge who tried the case had some doubt, and perhaps had a better opportunity of judging than I had, but speaking from the single fact that this man refused to put himself in the box and contradict the witnesses brought to prove his guilt, we have a right to assume that those witnesses told the truth, and that in the years 1886 and 1887 he had been guilty of the offence.

HON. MR. MACDONALD (Midland)—The hon. gentleman states distinctly that she made the house so disagreeable that her husband had to leave it. I will call the hon. gentleman’s attention to the evidence of the respondent’s brother :—

“ Q. You say that his wife constantly complained to you about his keeping late hours ? A. She did constantly. Q. Had she ground for that complaint ? A. Certainly she had. He did keep late hours. Q. Were you very much astonished ? A. “ I complained to my brother about it.”

HON. MR. DICKEY—I have stated that already in stronger language, because I have quoted her words that he went out of the house to play cards and spend the evenings away from her.

He got into bad habits, which was very disastrous to the happiness of the family ; but I am afraid if every man who stays out late at night, and plays cards even for money, gives ground for a divorce or for the wife abandoning him to his fate, we shall have a good many applications for divorce. There is testimony to show that so long ago as eight or nine years this man was seen coming out of a house of ill-repute. What is that evidence ? It is to this effect, that he was seen about the door, and was supposed to be coming from that house. The chairman examined the witness as follows :—

“ Q. Then you are perfectly positive that this was Mr. Hart who was sitting here ? A. Yes, I am pretty positive that was “ Mr. Hart. Q. Have you any doubt of it ? A. I do not know, as “ he and his brother resembled each other pretty considerably, “ but I understood it was Mr. Fred. Hart.”

This is a man he had only seen once in his life and to whom he had never spoken, and yet that is the evidence that is relied upon. It does not show anything like the offence charged against him ; there is no evidence whatever that it came to the knowledge of the wife or could in any way have afforded her ground, even if she was suspicious, to justify her in leaving him. Now the woman who kept that house is asked as to his being there, and to a certain extent she confirms the statement that Hart was there. The evidence is as follows :—

“ Q. When was it you first saw Mr. Hart ? A. About “ nine or ten years ago. Q. You said he was with other gentle- “ men at that time. A. Yes. Q. And he came in the evening ? “ A. Yes. Q. Did he have any connection with any woman in “ the house at that time ? A. Not that I know of. Q. He sim-  
ply came in in the evening with other gentlemen, stopped for a “ time, and went out again ? A. Yes.”

That is all the evidence ; there is not the slightest proof of adultery. It is not wonderful that a woman brought up as this lady was—because I am told she is a lady—should brood over her troubles, keep in her room, and make things unpleasant. Another witness stated, I think it was the Respondent's brother, that when she scolded her husband or attacked him in any way, he simply said nothing. Unfortunately he took to late hours, she deserted him, and I say she is not entitled to relief, because if adultery was committed afterwards, she in the eye of the law contributed to it herself and must take the consequences. Under these circumstances, I think the Bill should be rejected. I would not have risen to speak had it not been for the fact that the hon. member from Barrie cut himself adrift from the old established precedents which have been handed down to us from generation to generation and which I hope will ever guide us in our deliberations.

HON MR. POWER—Fortunately for this House, as a general rule it is not necessary to consider in this Chamber the evidence submitted by the Committees which have to deal with cases of divorce. As a rule Committees are unanimous or nearly so in the decisions at which they arrive; consequently it is not the duty of the other members of the House to consider the evidence at all. In this case we were informed at the very opening of the debate on this Bill, that there was a very wide difference of opinion amongst members of the Committee; and, under the circumstances, it became the duty of the other members of the House who were not members of the Committee to read the evidence for themselves so as to be able to judge to the best of their ability as to the merits of the case. I read the evidence yesterday with a good deal of care, and I shall mention the conclusion which I have come to on the matter. The first fact which must strike everyone who reads this evidence, is that the marriage was an unfortunate marriage from the beginning. The secret of the unhappiness, which seems to have begun almost from the union of the parties, was that it was not a marriage of affection. From the early history of the case it would seem that the husband was induced to marry Miss Tudor more on account of the fact she was worth \$200,000, than from any affection he had for her; and I think all the unhappy consequences which followed from the union are to be credited to that fact. It appears that after their marriage they went to live in the house of the husband's father. It does not appear that the husband in any way ill-treated his wife—that he was unkind to her, or that he was guilty of any actual misconduct. It does appear that from a very early period of their married life the husband neglected his wife; that instead of spending his evenings at home, he spent them at the club, and I am not very much surprised at that. He had not married his wife because he loved her, but probably because he thought it was a suitable marriage in a pecuniary way; and hon. gentlemen will notice from the evidence of other parties I think, that besides that of the husband's brother) I think it is from the evidence of the physician) that the wife was a lady of a somewhat difficult temper, and not the most agreeable person in the world to live with. At least she was not suitable to Mr. Hart, and he was clearly not suited to her. Consequently Mr. Hart, finding that his home was not made as pleasant for him as he thought it might be, did not quarrel with her or use bad language to her but simply stayed away. Instead of spending his evenings at home with his wife, he spent them at the club. I began to read the evidence with a strong conviction that Mr. Hart was, as an hon. member put it, a low blackguard. I cannot say that I have been altogether induced to change that opinion on reading the evidence; but my conviction on that point is not as strong as it was before I began to

read the evidence. It does not appear that Mr. Hart was guilty of any actual violation of his marriage vows until after his wife left him. It is true that the hon. gentleman from Midland stated that that appeared in the evidence. It has been already pointed out however, by the hon. gentleman from Amherst, that that was not the case. The witness Frank Brady mentioned the fact that he met a person, whom he identified as the respondent in this case, in the house of a woman named Spencer, in Montreal. He was coming out with some other persons. It happened that a woman who was an inmate of that house was subsequently examined as a witness. She was in the house at the time that Mr. Hart was there; and she was examined with respect to Mr. Hart's presence there, and declared distinctly that he was not on that occasion, as far as she knew, guilty of any offence; that he simply came in in the evening with some other gentlemen, stopped for a time, and went out again. So that there is no evidence that up to the time Mrs. Hart left her husband he had ever been unfaithful to her. Some hon. gentlemen seem to think that this is a highly improbable view of the case. I do not think it is; because it is a rather unfortunate circumstance that the wife employed a private detective to ransack her husband's previous history; and evidently that detective, doing his work thoroughly, went back a good way into his history, and discovered just this one fact, that on this one occasion the respondent had been seen in a house of ill-fame. If Hart had at that date been in the habit of resorting to houses of this kind, that fact would have been discovered by the detective, and I think it is only fair to the respondent, who has rights in this case as well as the petitioner, to assume that up to the time his wife left him he had not been guilty of any act of adultery. There is nothing in the evidence at any rate to lead us to believe that he had. While the feelings of the wife are to be considered, I think that the reputation and the feelings of the man and his family are also to be considered, and that we should, in the interests of the children, who are his as well as hers, do nothing to blacken his character more than the evidence blackens it. The evidence makes it bad enough, but I do not think we should do anything to make him worse than the evidence does. There was one circumstance upon which a great deal of stress was laid by the hon. gentleman from Midland, and I think it was also made the subject of interruptions by my hon. colleague from Halifax, and that was the exhibiting of the photograph. I think it only fair to this man to point out what the actual circumstances were in connection with that photograph. The person under examination was, I think the woman who kept one of those houses in Montreal; and her evidence was that sitting in the parlor of the house, he was talking about one thing and another, and had some

pictures in his pocket, and he appears to have taken the pictures out of his pocket, and amongst others there was the picture of his daughter. It is very unfortunate that that picture should have been seen ; but the circumstances were as I have stated. I think the facts of the case as we have them before us, and that is what we are to go by, are as I have stated. These people did not get along harmoniously, and after some time the wife, without what is in the eye of the law, justification, deserted her husband ; that he asked her to come back again and she declined to go back. It does not appear from the evidence that immediately after her leaving him he was guilty of any gross misconduct ; but it appears that after the lapse of a year or so this man did do certain acts which, if his wife had been living with him, would have formed good ground for an application for a divorce on her part. The question for us is whether, if a woman desert her husband and persist in that desertion, and he finally commits adultery, she has not contributed to that adultery so as afterwards to be debarred from a divorce on that ground. I think she has. I think she was *particeps criminis*, and is to all intents and purposes almost as responsible for the acts of her husband as he is. She does not come into court with such a record as to justify us in granting her the relief which she asks. I do not purpose to discuss the question at any length ; but I wish to say a few words about the decision of the Court in Montreal, which has been made the subject of animadversion by one or two hon members of this House. The law of Quebec has been animadverted upon as though it were a law which is not suited to English speaking people. I do not think it is deserved ; because the law of Quebec as to separation from bed and board is substantially the same as the English law of to-day on the subject of divorce. In England the wife cannot get a divorce from her husband on the ground of adultery, unless it is accompanied by aggravating circumstances ; and these circumstances do not exist in this case, so that the Court in Quebec was justified in the decision they came to under the law of that Province, and the decision would not be an objectionable one, even if the application had been made in an English court for a judicial separation. I think that in these cases we should try and get out of our minds all feelings of sentiment and sympathy and deal with them according to the law and to the rights of the parties.

HON. MR. MACFARLANE—Having sat on the Committee, and having paid a great deal of attention both to the examination of the witnesses and the conducting of the case, I must confess that I am compelled, having considered it in all its phases and aspects, to refuse my assent to this bill of divorce. I feel that we are dealing with a solemn matter, and that in this House we are not to be carried away by sympathy ; that we are to view as stern

facts the matters that come before us for adjudication, and that while our feelings may be that people are wedded and living an unhappy life and would be much better if they were separated, still we must be careful that we do not introduce into this country any system by which divorces are to be made so easy that we may fall into something like the lax system which prevails in the neighboring Republic. Hon. gentlemen will see that in this case these two people were paired and not matched. It is very evident that that they went together comparatively young people—hardly out of their teens. They had no understanding of each other, and no feelings in common. They lived together some few months with comparative comfort and affection, but their habits and tastes were totally dissimilar, they were totally without experience, in fact, they were not fitted for each other. In our decision in this case we should be bound to some extent by precedent, and we should see that the decision which Parliament arrives at is such as can be justified in cases that may arise hereafter. We should be guided to a certain extent by the decisions we have given before in other cases. The hon. gentleman from Barrie has, no doubt, given this matter a thorough investigation from his point of view, and has satisfied himself as a professional man on one point. From another point the hon. gentleman from Amherst and myself and other professional men arrived at a different opinion—that the evidence did not sustain the position that my hon. friend has taken. I may say that I have taken some little pains to acquaint myself with the matter, and I believe that Parliament should not, except in very extreme cases, override the decisions of a competent tribunal. This case came before the courts in Montreal on a suit for separation from bed and board. The hon. gentleman from Midland, who is very eloquent in his defence of the Bill, said that the lady was not examined before the Court in Montreal, and could not be examined in her own case, under the rules of the Court. There is no doubt that parties to a suit, in the Province of Quebec, are not entitled under the laws of that Province to give evidence in their own behalf; but with the consent of both parties the evidence may be produced, and I felt satisfied when this lady came before the Committee, and she admitted that she had been examined in the court below. On her re-examination by counsel, Mr. Atwater, who conducted the case for the Respondent in the court of Quebec, put the question; “Did you say to him after that his life was no affair of yours? A. “I said something when you asked me about it. I might have “said something of that sort in the separation case, because you “asked me in some such way as though I had been behaving as “an undutiful wife, and you twisted my words to suit your own “purposes.”

I take it on that evidence that the lady was examined in the

court below by the consent of the Respondet himself as well as on the advice of her own counsel.

HON. MR. GOWAN—Whether she was examined or not, I cannot recollect from the testimony, but there is a distinct provision in the Code that the evidence of either Petitioner or Respondent, is not evidence on his or her behalf.

HON. MR. MACFARLANE—I quite agree in that, but that she was examined and gave her testimony is evident from the proof we have in the record before us. The matter was investigated by an eminent judge, whose desire was, no doubt, as the desire of hon. gentlemen would be, to separate these people if he conceived that the evidence brought before him would warrant him in doing so, but after giving it a most careful consideration, he was not able to arrive at that conclusion and dismissed the case. Although we are not bound by the ruling of the court, as we are superior to the court and make the laws here for ourselves, we should be guided by the the public interest and by our desire to do what is right, and we are not to establish a dangerous precedent for other cases. I believe that, as a rule, in England, divorce has not been granted by Parliament on the ground only of adultery committed subsequent to separation. There must be sufficient cause for voluntarily leaving the husband—sufficient cause for so doing being in such cases held to be such as would entitle the party to a judicial separation—that is to say for cruelty, desertion and adultery. These are the only three grounds taken as sufficient to grant a divorce. The principle involved in this statement is that if one party leaves the other, except for good reason, the party so leaving is held to be contributing to the likelihood of the other person being guilty. Now, the question arises from the facts that have transpired, and which appear from the petitioner's own evidence—which is the principal evidence if not the only evidence we have—was that of such a nature as to warrant her in separating from her husband? It is not pretended that there was any desertion on his part, except staying out at night at the club and sometimes not coming home until morning. I dare say he was not as attentive to his domestic affairs as he should have been; but there was nothing in the eye of the law that can be considered cruelty in his treatment of his wife. She admitted herself that there was no ill-usage—that he treated her at times in the most kindly manner. In one instance only, where there was a dispute, did he talk violently. More than that, after she had arrived at the conclusion that she could no longer live with him; she left his brother's house. What took place then? Again and again he visited her at Mrs. May's. She came with her children afterwards to the brother's house and took her Christmas dinner with him. They had a child that was ill at the hospital; the husband took the wife to the hospital and brought her back again, and this after



she had repeatedly said that she had separated from him finally and could never return to him. Up to that time no act has been proved against him that would warrant the wife in leaving him. I cannot conceive that any person would believe that the single fact of this man having been seen coming out of a house of ill-repute with others, furnishes evidence that he was there for improper purposes. It was unfortunate that the man should have gone there. We have the positive proof of a witness, who was in the house at the time, that he only entered with the others, remained a short time and went out ; and that is the only instance that we have at all of anything approaching impropriety of the kind. In the other instance, where the petitioner herself says that while they were out in Georgia he went away from her, she does not know if he was guilty of impropriety. When the question was put to her—"before separating from your husband had you any positive proof of infidelity on his part?" she fairly admitted she had none. She left her husband on suspicion and no other ground.

HON. MR. GOWAN—Why did he not go into the box and deny it?

HON. MR. MACFARLANE—It would have been a great deal better if he had gone into the box and denied it. I have felt compelled to conclude that up to the time of this woman separating from him, she had no legal ground for separation. She had proved no acts of cruelty ; she had simply shown that the man had been out late at night card playing, and had doubtless been squandering her money. It was a hard case, but we see instances of that kind every day where men lead a dissipated life. It does not appear from the evidence that drunkenness was one of his vices, while he was guilty of staying out at night. No proof was adduced that he was given to drunkenness. If there was nothing up to the time of the wife's desertion of her husband that would warrant her application for divorce, then her leaving him as she did, was a mistake on her part. The proper course for her was to have endeavored by her own conduct to reclaim him from those haunts ; she not only did not charge him with infidelity, but she never reasoned with him, never took the means that a woman should take to reclaim an erring husband. She never said to him : "you are going out to an improper place, why do you not remain with your family?" We have the evidence of the physician Baynes, that she was a lady of a very peculiar temperament. He says she was hypochondriacal, and he was called in to an examination. He says she was a woman of an exceedingly nervous temperament, a fact which I am sure the members of the Committee could not have failed to notice, as I did, when she was examined before them. It is very evident that she is a woman of an exceedingly nervous temperament—that she was really hypochondriacal and imagined things often that did not take place. She could not as-

sign reasons or furnish causes for the course she took. We have further the evidence of the housekeeper, Annie Boyle, who lived at the brother's house and knew them up to the time they separated. Her testimony is that he was a kind and devoted husband, exceedingly fond of his children, that he kept late hours, but from all the opportunities she had of seeing them she thought they lived amicably and comfortably together. Having arrived at the conclusion that up to the time of the separation she had no cause to apply for a divorce, I do not believe that the subsequent acts of adultery and his subsequent life justified the application. No doubt he went astray, and very badly astray. She had left him to evil associates and in a city like Montreal he would be likely to be led away by them. The cases decided in England all go to show that where a woman leaves her husband, without a sufficient ground for separation, the subsequent misconduct of the man does not furnish ground for divorce. As regards cruelty, no ground has been established for this application. Both the text-books and the cases show that cruelty must consist of legal cruelty—ill treatment of a wife. He may be cruel in language or speech, but it must be cruelty such as the woman felt endangered her life and compelled her to leave him lest he should at any moment turn on her. There was nothing, in my estimation, to justify this lady in leaving her husband, and by her desertion of him she was largely instrumental in his going astray afterwards. My hon. friend from Midland said she was driven into the street. She had large means of her own : she was not like a woman dependent solely on her husband for her support. A large portion of her property was guarded by trustees and he could not get hold of it.

HON. MR. MACDONALD (Midland)—He took all he could get.

HON. MR. MACFARLANE—That may be true, but this lady has never been left on the street. She has been able to go to England with her family. She was in a different position from a woman wholly and solely dependent for the support of herself and children on her husband. While I should like to see this woman obtain some relief, I think we should be establishing a dangerous precedent if we granted this bill of divorce. If we admit that diversity of temperament, and other causes which prevent people from living happily together, furnish sufficient grounds for divorce, the applications for relief will increase enormously.

HON. MR. MACDONALD (Midland)—I should like the hon. gentleman to explain what he thinks of the man's remark to his wife—"It is not very pleasant to wake up and find yourself next to a harlot."

HON. MR. MACFARLANE—It is true the lady said he made a remark of that kind. They were very probably having a misunderstanding. You cannot tell what gave rise to the remark. My hon. friend certainly would not hold that was a sufficient ground

for granting a divorce. I feel reluctantly compelled to oppose this Bill, and shall vote against it.

HON. MR. TRUDEL—I regret very much that somebody conversant with the French law in force in our province has not vindicated our system of law. I wish to enter my protest against what has been said of a system which has stood the test of centuries and which has been in force and is still in force in most of the great civilized states of the world. I think that those laws, properly explained, should be the best justification of the position which is taken by those who oppose this Bill. It is hardly necessary for me to say that those who belong to the Catholic faith are, under any circumstances, opposed to divorce, but there is something more. The whole question has been considered by the supporters of the Bill as a private matter—that is, as a difference between this unfortunate wife and her husband. In my humble opinion, this matter cannot be decided without being examined into from a public point of view, and the interest of third parties should not be ignored. The children of these unfortunate people would be placed, by the passage of this Bill, in a worse position than they occupy now. It might be a great injustice to them to pass this Bill unless there are good grounds for doing so. I regret that the reasons, founded on public morality and justice, which are so evidently the basis for our system of law have not been explained by somebody conversant with the system, and I protest against the manner in which that system has been so bitterly assailed.

HON. MR. KAULBACH—In a matter of such importance as this we should hesitate before we decide upon separating husband and wife. To undertake such a duty as devolves upon me in this important matter—a matter of such serious responsibility, everything should be heard that can be said on either side. I have sat here for a long time patiently listening to the reasons given by my hon. friend from Barrie, desirous if possible to view this matter in the same light that he did, but he failed to convince me. On the contrary, he has forced me to the opposite conclusion. I feel myself obliged, before voting, to give my reasons for the position I take. My hon. friend from Barrie has lost sight of the mantle which covered him while he was a judge in the courts. No person sitting in the Committee at the hearing of such cases as this has been more anxious than he that established precedents should be followed. He searched carefully the decisions of the House of Lords, and he was anxious that no report should be presented to the House which was not on all fours with the decisions of the House of Lords. I know of no gentleman who sat on these committee, who was so desirous that we should follow the wise judgments and decisions of the English courts in these matters as my hon. friend, yet yesterday he ignored his past record. He said

we were in a different atmosphere altogether in this country, that we were not in harmony with the sentiments of England—that we had a different standard of morality and a different social condition. He led us to believe that we were above all law here—that we are merely legislators. I do not consider in the discussion of this matter that we are above the law. It would be unwise for us and would be an interference with the liberty of the subject if we were to say we are a law unto ourselves, and to disregard the law of the land and act according to our own notions of what is wise and proper. I hope we will never come to that. My hon. friend led me with many others, to believe, when he moved for a *quasi* court of enquiry in those matters, that his object was, if possible, to keep these divorces within certain limits, and to avoid hasty and imprudent decisions in these cases. Yet my hon. friend casts all that off and, regardless of precedents and rules, comes here and asks us to decide this case, not in conformity with any case he has not read of, but in contradistinction to and in violation of every precedent we have had not only in the House of Lords, but in the Divorce Court in England. I must differ from my hon. friend in that regard. I contend that we are bound under rule 84, to take not only the practice of the House of Lords, but we are bound also to take the decisions of the Divorce Courts. My hon. friend has now departed, for the first time, from the safe course, and has set up a different doctrine and rule for our guidance in matters of this kind.

HON. MR. GOWAN—Will my hon. friend allow me to offer an explanation? He has entirely misunderstood my position. The principle that I proposed to guide the House is precisely what was said by Lord Thurlow:—"The House passed divorce bills in a variety of circumstances. In all such cases their Lordships governed their conduct by the particular circumstances of each particular case under consideration. Indeed, he knew not how they could do otherwise; because with respect to divorce, he knew of no rule to direct their conduct or to limit the wisdom and discretion of the House." I have great respect for authority when it commends itself to my common sense, but not for authority when it is unsupported by sound reason.

HON. MR. KAULBACH—Can the hon. gentleman show any case of this kind where parties were separated *a vinculo matrimonii*—where parties have been separated for causes which would not justify them being separated by law or for cause which, if they went to a Court, would not give them separation *à mensâ et thoro*, that they could take anything the party had done subsequent to that and make it cumulative and add to the evidence and get a divorce *a vinculo*? The cases are distinct, that where a woman separates for a cause that would not justify that separation according to precedent, either for adultery, cruelty or desertion, a divorce

is not allowed, but my hon. friend would make it appear that the Courts of England were opposed to the wife. It is sound policy and sound judgment. It is the law to protect inheritance in England, that a man may be guilty of much indiscretion without involving divorce, but the wife's conduct must be above suspicion, that the issue of other persons might not come into the inheritance—persons not entitled to it. These decisions have gone far in the Courts that a wife should not, and cannot, leave her husband for the same reasons that would justify a husband in leaving a wife. On grounds of public policy, and wisdom, and prudence, which cannot be questioned, this distinction is made. I cannot follow my hon. friend where he says we are not bound by law and precedents. We are bound by them. This very question of desertion is made one to go before our own Committee. They are instructed at the second reading of the Bill to make this very enquiry—to ascertain whether she left the husband by consent, and if she was living separate and apart from him by his consent at the time of the adultery. The very question itself shows here that it is on all fours, not only with the decision in the Quebec Court, but with the decisions of the House of Lords and the Divorce Courts. Here we have followed the same decisions and practice. When she released him from his marital relations, she could not afterwards claim a divorce because of the consequences which followed her desertion—she cannot make that a ground for a subsequent separation *a vinculo matrimonii*. This is the principle recognized, not only in the House of Lords, but in the Divorce Court, and it has been established and declared in the Province of Quebec, and in this very case in which the same issues and facts and questions of law were raised that are before us now. But what do our instructions to the Committee say? “You shall enquire as to whether at the time of the adultery of which she complains he was by deed, or otherwise by consent, living separate and apart from and released by her, as far as in her lay, from his conjugal duty.” This question came up before the Committee and was the question to be decided by them. If she was living with him at the time he committed the offence of which she complains, there would be ground for a divorce, but if, on the other hand, she separated from her husband, as the evidence shows she did, without his consent and authority, and for a cause which would not justify her leaving him, then she takes the responsibility upon herself of her own conduct, and she cannot hold him responsible for any indiscretion which he subsequently commits. That is sound judgment, and it is the law as administered in the Courts of Quebec and in the Courts of England, and before the establishment of the Divorce Court there, in the House of Lords. My hon. friend says we are here to make a law for ourselves, in every case to act upon our own judgment and sentiments. I regret that he

would seek to introduce such a principle into this Parliament, for if the sacred matrimonial tie is to be severed in any case, we are bound to do so on the strict legal rights which exist between husband and wife. I am surprised at my hon. friend laying down such a rule for us to follow. It is quite evident to me that my hon. friend in this matter has made up his mind that this woman ought to be separated from her husband. I agree with him that it would be better if they were separated. I do not believe that by habits, tastes, sentiments or any rule they could be made a happy and loving people—loving and cherishing one another. None of those sentiments and feelings which would make them a happy couple exist in their case, but that is their own business. Having entered into this holy estate of matrimony they must abide by the consequences of it, and unless a case is made out of cruelty, desertion and adultery which would justify divorce, she must put up with the bed she has made for herself. My hon. friend asks us why did he not go into the box and prove that he had been guilty of that with which he had been charged. What ! to disprove what has never been proved ? You have got in this evidence after every part of Montreal had been ransacked for testimony against him and the vilest people have been employed for the purpose—no proof that during all his married life of some eleven years he had been guilty of anything which would justify this woman in applying for a divorce. There is proof of but one case which casts a little suspicion upon him. He was seen coming out of a house of ill-fame with two or three gentlemen. Does that prove that the man went to the house for improper purposes ? No, I do not believe that is the way he would visit the place if he meant to do evil, but the very woman brought to prove that he was guilty, disproves the charge. She distinctly swears that, as far as she knows, nothing improper occurred there. Then where is the evidence of adultery in this case ? There is nothing of the kind to justify the charge. Then my hon. friend says he ought to have gone in the box. I say there is no reason why he should go into the box, and he may have been governed by a different reason than consciousness of guilt in not entering the box. He may have felt that his wife has separated from him for causes which he regrets, but he is not the man to hurl a stone at her character—he is not the man to try and destroy her reputation. He said nothing to cast a stain upon her name. He does not come there to injure the character of his wife or his children, and therefore he is willing that the law shall take its course, satisfied that there is no justification for her conduct. He stands upon that and upon his rights. My hon. friend asks why did he go to such a place ? Many a man, when he is away from home, may be led into vice. It is not contradicted that they lived together in harmony as husband and wife and

apart from this charge of adultery, which is positively disproved, what is there to be said against his character? That he belonged to a club of which many of the best gentlemen of Montreal are members! No man can become connected with that club who is in bad standing in society. They say he gambled there, but no gambling is allowed at that club. He went there and probably kept late hours. There may be some who do not know about such places, but very few gentlemen do not visit those clubs—respectable men—standing well in society, and there is nothing said against a man's character on that account. The Respondent in this case frequented this club because his wife's company was not congenial to his taste.

#### AFTER RECESS.

HON. MR. KAULBACH resumed: When six o'clock came, I was endeavoring to show to the House that if we are governed in all those cases by the precedents, not only of the House of Lords, but of the Divorce Courts, it will be found that in no case similar to this was a wife allowed a separation *a vinculo*. I was contending at the same time that for simple adultery by itself, there is a distinction made—that it would not justify a divorce *a vinculo* on the part of the wife, which adultery by the wife would justify a divorce *a vinculo*; and I was endeavoring to show by the decisions of the House of Lords, that they always appeared to be guided by precedent in those cases. The hon. gentleman from Barrie rose to interrupt me and to show that my position was false. I sat down to hear how he could meet the position I had taken. My hon. friend rose with that weight of authority that is peculiar to him, and with a book before him cited his authority to the House. I do not wish to impute to my hon. friend any intention to deceive the House, but by simply taking one sentence from the decision which he quoted he succeeded in creating an erroneous impression on the House. The hon. gentlemen must have known that the case he cited was not an ordinary one of adultery on the part of the husband; it was that character of adultery that had never come before the public in this form prior to that date. It was a case for which there was no precedent, and God forbid that we shall ever have such a precedent again, and it was an exceptional case where the rule was departed from. My hon. friend did not tell us that it was a case in which the man was living in adultery with his wife's sister, and the offence was of such a nature that the parties could not come together again, because the connection would be incestuous. It was an extraordinary case and did not come under the ordinary rule of divorce. My hon. friend from Barrie said that there was a general rule propounded by Lord Thurlow that every case should be tried on its own merits.

HON. MR. GOWAN—The hon. gentleman is misstating what I said. My hon. friend was advancing the position that in the House of Lords they were governed invariably by precedent, and I quoted Mrs. Addison's case, merely to show that, while the Lords guided themselves by precedent as a rule, still the whole domain with regard to every matter coming before the House of Lords was within their grasp, and I quoted Lord Thurlow in that connection only.

HON. MR. KAULBACH—My hon. friend made the quotation to show that every case stood on its own merits, and his intention was that simple adultery would be a sufficient ground for a bill of divorce against the husband in the House of Lords. I will read the case to show what the feelings of the Court were, because it was only under these particular and exceptional circumstances that the law lords departed from their practice in other cases. The head note is (n) :—"Bill of divorce by wife, on ground of husband's criminal conversation with wife's sister. Record of judgment against husband received in evidence. Debate. Speech of Lord Thurlow. Held that after husband's criminal commerce with his wife's sister, intercourse between husband and wife would be incestuous."

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"It appeared in evidence that Mr. Addison had maintained a criminal intercourse with his wife's sister, Mrs. Campbell, the wife of Dr. Campbell, a medical officer in the service of the East India Company. For this injury Dr. Campbell recovered a verdict against Mr. Addison for £5,000 damages; and Mrs. Addison proceeded against him in the Ecclesiastical Court, where she in due time obtained a sentence of divorce *à mensâ et thoro*. It was under these circumstances that she now applied to Parliament to be relieved by Bill of Divorce from all connection with the husband thus at once convicted of adultery and incest."

The foot note says "the case of Mrs. Addison was undoubtedly the first example of such an application."

The Bill having been read a second time, the debate was opened by the Duke of Clarence, who opposed the measure solely on the ground of the sex of the Petitioner, and concluded by moving that the first enacting clause of the Bill be expunged. Lord Thurlow rose to reply and said: "He had considered the manner in which the crime of adultery was treated by the Levitical law, by the Mosaic institutions, and by the Gospel; and he found in all of them that the woman might be put away by her husband for adultery, and there was no express injunction that the wife might not, on the same crime of adultery having

(n) Macqueen's practice, House of Lords, and Privy Council, p. 594.



“ been proved against the husband, obtain a separation from him ;  
 “ nor was there any prohibition restraining the parties from  
 “ marryng again. In modern times divorces had been granted by  
 “ the legislature *a vinculo matrimonii*, upon proof of adultery by  
 “ the wife. The necessity of appealing to the legislature for  
 “ such a separation arose from the ecclesiastical courts not feeling  
 “ themselves warranted to do more than to grant a divorce *à mensâ*  
 “ *et thoro* ; which, was in one point of view, sufficient ; because  
 “ it put an end to the marriage connection as there could be no  
 “ further cohabitation unless a reconciliation took place. The  
 “ House passed Bills of Divorce in a variety of circumstances.  
 “ In all such cases their Lordships governed their conduct by  
 “ the particular circumstances of each particular case under con-  
 “ sideration. Indeed he knew not how they could do otherwise ;  
 “ because with respect to divorce he knew of no rule to direct  
 “ their conduct, or to limit the wisdom and direction of the  
 “ House. Where was he to look for such a rule ? Was it to be  
 “ found in the common law ? Was it to be prescribed by special  
 “ statute ? Was it enforced by reason, by common sense, by mor-  
 “ ality or religion ? No such thing. What was the nature of the  
 “ objection to granting the petitioner, a much injured wife, the  
 “ divorce which she prayed ?

Then comes the remark from which my hon. friend quoted two sentences, and which shows that in an exceptional case like this, the House of Lords departed from their rule for the cogent reasons which I have given :—“ Let the circumstances be duly  
 “ weighed and considered. Mrs. Addison complained of her  
 “ husband, not merely on the ground of adultery, but on the  
 “ aggravated ground of incestuous adultery. Let their Lordships  
 “ suppose by way of illustration, that Mr. Addison had carried on  
 “ a criminal connection with Mrs. Addison’s sister previously to  
 “ his marriage with Mrs. Addison. In that case he could not  
 “ have contracted marriage with his present wife, because such  
 “ marriage would have been tainted with incest, and if entered  
 “ into would have been pronounced by the Ecclesiastical Court,  
 “ void in itself. Look then at the question as it actually stood :  
 “ in divorces, expectations were sometimes formed that a reconcil-  
 “ iation might take place between the parties. But in this case,  
 “ were Mrs. Addison ever so much inclined to forgive her hus-  
 “ band, a reconciliation could not legally take place : because  
 “ after-connection between them as man and wife would be tainted  
 “ with incest.”

“ The Lord Chancellor (Eldon) remarked that he should feel  
 “ little difficulty in giving way to the greater wisdom, experience  
 “ and judgment of his learned friend ; as he was now satisfied that  
 “ the divorce in the present instance from the specialties of the  
 “ case stood manifestly *contra* distinguished from any other appli-

“ cation by a wife for a divorce, that was likely to be brought  
“ before the House ; and that the Bill might pass without operat-  
“ ing as a dangerous precedent. At the same time he must  
“ retain the opinion that upon an application by a wife, on the  
“ adultery of her husband, for a divorce, the application, resting  
“ on that simple and distinct ground, ought, for the sake of secur-  
“ ing the morals of the public, to be resisted and refused. It was  
“ to be considered that adultery committed by a wife and adultery  
“ committed by a husband, were widely different in their conse-  
“ quences. The adultery of a wife might impose a spurious issue  
“ on the husband, which he might be called upon to dedicate a  
“ portion of his fortune to educate and provide for. Where no  
“ such injustice could result to the wife from the adultery of her  
“ husband ; and in many cases, not only a reconciliation might  
“ be brought about, but it became the special duty of the wife  
“ to forgive her husband from motives of tenderness and concern  
“ for the interests of her innocent children.”

Then comes the remark of Lord Rosslyn upon the same point, who said :—“ It had not occurred to his mind that a recon-  
“ ciliation could not legally take place. His objections to the  
“ Bill were in a great measure removed. It stood upon strong  
“ special grounds, and might safely pass.”

Now, I would ask the House, after what my hon. friend has said, whether it was fair to quote this as a precedent for saying that the House of Lords were governed by no rules and by no authority at all. The hon. gentleman read only a few extracts from Lord Thurlow's remarks, to justify the extraordinary position he takes to-day, that we are not to be governed by precedents, and that each member is to be governed solely by his own feelings and sympathies. I say if that is the case, then away with such a court as this or any decision coming from a body governed by no rules, no precedents and no law ; a body who are a law unto themselves, governed merely by their own whims and sympathies. I say we are bound in this case to be governed simply by the evidence before us and we can take no other position and cannot listen to what people outside say with regard to the character of the man or the character of the woman ; and if hon. gentlemen have read the evidence, they can come to no other conclusion than that there was no justification for this woman deserting her husband. We are told that she had no home to go to, that she was obliged to leave her husband. That assertion is not based on fact. He had a house for her and lived in his house. The evidence is not that he was a cruel husband. He took her down to Florida with him for the sake of her health ; she came and went at her own caprice. She travelled to England, when she pleased. She travelled to the United States when she pleased, and took her children with her. Is there any evidence of

cruelty in this? It is shown that he maintained his family; that he had an income from his earnings of \$4,000 a year; and the assertion that he had no house for her to live in, is an assertion without any foundation in fact.

On the first page of the evidence the petitioner is asked "was there any particular reason for your residing there (at her husband's brother's) at that time and not in a house of your own?" Her answer is "Yes, he had no home to offer me. Our house, which was next door, was let at the time and he had no business and no home to give me."

Does that show that he had no home, because it was let? They had just come up from Georgia where they had been living harmoniously and happily together, as the evidence shows, and by her own statement. Was he to leave his house vacant all the time while he was away with his wife for her health—leave it idle until their return, because of her caprice? There is evidence that they had a house; that the time of the tenant was not up, and that they lived with the respondent's brother temporarily. After living with him for a time she goes of her own accord and takes rooms at Mrs. May's boarding house temporarily, and we know from the evidence that she never told him that it was a step towards leaving him forever. She never accused him of any offence or said that his conduct was such that she could not live with him. Being a woman of excitable temperament, she imagined many things that did not exist. The doctor says she was hypochondriacal. She imagined she had syphilitic disease when there was no such thing wrong with her. Having left her husband and taken rooms temporarily at Mrs. May's, he visits her there, and when one of the children was sick at the hospital, he went with her to visit his child. They come back together; they dine together and visit at his brother's; yet during the whole of that time she said nothing to lead him to suspect that she had any intention of leaving him. It seems to me it was only an after thought on her part to leave him for good. After carefully reading the evidence, one can find nothing to prove any cruelty or bad conduct on his part toward his wife except that he was infatuated with cards, and stayed out late at night at the St. James Club. It is not shown that he played for money. Has she shown, from her history of her married life, a disposition to keep her husband at home? We have evidence to the contrary—that she never complained against her husband; that they lived harmoniously together, and the only complaint she had to make of him was that he kept late hours; that he was irregular in coming to his meals, and sometimes stayed out all night. We have the evidence of the doctor, who was examined, who describes the great anxiety the husband felt for her health, for her recovery and for her happiness. He urged the doctor to do anything he could

to improve her health and her physical comfort. It is evident that this pair were not suited to each other. She was well provided for ; she had nothing to do ; had plenty to live upon ; had servants at her command ; and there is not a tittle of evidence that he squandered her money, except some \$10,000 that he got from her to embark in a business with a man named Gordon, and some \$40 which he borrowed on another occasion to maintain the house. There is no evidence that he in any way abused her, or that he spoke harshly to her except when irritated about his mother-in-law's will, when he was excited and used some cruel remarks with regard to his wife's mother. Now, what was the temperament of that woman ? She was of an excitable nervous temperament, easily aroused into a passion, easily provoked. We have evidence that she lived with his family for awhile and that she lived in discord with her husband's family—that she lived in discord with her own mother, and for years would not speak to her. We have evidence that while she was in those moods her husband was kind and indulgent, and never made a reply which would provoke her to anger or interrupt the peace of their home. Hon. gentlemen cannot show me a tittle of evidence that he was not kind to her in every respect, except that he kept late hours. She leaves her husband and goes away to England with her children to live apart from him. Did he act as some men would do, press his rights and insist on her coming back to him ? No, he begs her to come back, but she refuses all his requests, and it is without his knowledge that she leaves for England, taking the children with her. It is not in human nature that a man would submit to such treatment quietly, as he has done in this case. Take the evidence of his own brother and of the servant who lived in the house for four years. They both agree that the respondent and his wife lived in perfect harmony. The servant girl says that she never knew a dispute between them, and never knew a gentleman so thoughtful and kind. These statements are not contradicted, and in view of all these facts, I would ask if there is anything to justify this woman in leaving her husband and taking her children with her ? I cannot see where the justification comes in, because she made no charge against him, and if she had ground for charges against him, she never made them. She complained of his late hours, but to nobody did she complain of infidelity on his part, until she was about leaving the country. If we decide that it is right for a woman to leave her husband without justification, then I say we are taking the first step to destroy that close relation which should exist between husband and wife. We are encouraging separation and divorce, and encouraging people to live in discord, and wives to drive men to lead abandoned lives. I regret the conduct of this man after his wife left him ; but I say she

contributed towards his misconduct. She left him for three or four years without justification, having made his home most uncomfortable for him. If he took company home she was not disposed to entertain them, and he was driven to seek his comfort and happiness where he ought to have gone, that is, to the club. After she has deserted him for two years, she comes back to Canada and sets detectives to work to hunt up all his past history, and to find out something on which she could base a charge against her husband. Now, are we going to justify this woman's desertion of her husband for two years without cause, and to grant her a divorce because of acts committed by him after her separation from him? 'Tis absurd. Common sense will not justify it, the law of divorce will not justify it. Instead of showing a disposition to reclaim him or make his home happy, I say she has made herself responsible to a large extent for his staying out at night instead of remaining at home with his wife and children. I contend that in a case of this kind there must be at least *prima facie* evidence of the guilt of the husband. It is not reasonable to suppose that he stayed out at night for any improper purpose. The detectives that were put upon his track found no bad conduct on his part during the time the wife lived with him, except the one instance of his being seen coming out of a house of ill-fame, and we have the evidence of one of the inmates that he came there with three or four gentlemen, stayed a short time and then went away. She is asked distinctly and plainly if anything occurred on that occasion to justify the charge made against him, and she says "no," and she never saw him there again until after the wife had abandoned him.

HON. MR. McCALLUM—It appears to me that if he was an innocent man he could have gone before the Committee and denied all this.

HON. MR. KAULBACH—No man will go into a witness box, when he is not called upon to do so, and there is no case made out against him. But there may be other reasons why he did not offer himself as a witness. He was unwilling to cast any stain upon his wife or children; he was willing to stand on his rights, that he had done nothing to justify a separation. I am taking a reasonable, a generous, a humane view of his conduct, and I say that he acted with a wise discretion in the interests of the character of his wife and his children. I contend that there was no necessity on his part to rebut the case at all; that his position was justified by the evidence which the petitioner adduced before the Committee. There is a great deal of contention that, in the court below, the case was tried on a different issue altogether.

HON. MR. GOWAN—No one said it was a different issue, but that there was not the same evidence adduced.

HON. MR. KAULBACH—My hon. friend makes an assertion

of which he has no proof. He was not on the Committee, but I am under the impression that although the petitioner did give evidence in the case in Montreal she got it in under the indulgence of the Respondent, and when she was there to give her evidence they could not shut her mouth.

There was evidence taken in the court below: the whole case was gone into and it is unfortunate for us that we had not that evidence. The whole record should have been before us to enable us to judge whether there was a discrepancy between the evidence in the two cases. Therefore I say that this was not determined upon that rule which the hon. member from Barrie would lead us to believe was followed—the 188th article of the Civil Code of Quebec. It was not decided upon that, but upon a charge of ill usage and grievous insult. The authorities have held that continued adultery or open profligacy, constitute grievous insult. The issue between the parties was the same in both cases and we should be careful about conflicting with the decision of the highest court in the Province of Quebec. We have here the petition in the court below—the declaration by the Petitioner, alleging notorious adultery. That is the issue under article 189 of the Code, and the same issue that was raised before us here. Then we have the pleas. What are they—desertion on the part of the wife.

“That during the fall of the year eighteen hundred and eighty four the said Plaintiff without any cause and without justification and without giving any reason therefore left the bed and board of the said Defendant and engaged separate lodgings for herself in the City of Montreal and refused to receive the said Defendant or live in a dwelling which he offered to provide for her.”

These are the facts set up, and the judge finds them true—he finds that the defence is correct. He says that she left her husband without sufficient cause—a decision which is identical with the decisions of the House of Lords and of the Divorce Court of England. Under no circumstances has either of those tribunals allowed a divorce to the wife under circumstances of that kind. The judge's decision is that the desertion of the wife, for so long a period without excuse, caused the acts of adultery of which she complains, and he refused to grant the separation. To over-ride the decision of a court of competent jurisdiction, with the same issues before us and between the same parties, would be to take a responsibility upon ourselves which I for one shall wash my hands clear of. I for one shall be no party in this House to going against the decisions of the House of Lords, of the Divorce Court of England, and of a competent tribunal in the Province where these parties reside. Now, the case of Lord Lismore establishes this principle, that if one party leaves the other, except for good

cause, and contributes to the chances of the other's infidelity, there is no ground for divorce. Cruelty and desertion are causes in England for separation from bed and board, and when you come to the greater separation—the severance of the marriage tie—the sacred tie, which I, for one, do not believe is merely a civil contract—I, for one, could never be a party to granting such a divorce unless I was justified by the facts—facts of such a nature that the parties could not live together again. The Act respecting jurisdiction and procedure says that the Court will refuse a divorce where the parties left each other without sufficient cause.

HON. MR. GOWAN—She had sufficient cause.

HON. MR. KAULBACH—My hon. friend says she had sufficient cause. If he wishes to contend this matter further I will show him that she had not sufficient cause. There is nothing to justify the desertion, and when the hon. member says that there is sufficient cause, he must divest himself of every rule which has governed his whole life, in his practice as a lawyer and in his position as a judge, and say that he is going, of his own caprice, to decide these questions and not to be governed by any principle or authority. If my hon. friend takes that position I am sorry that he, as a judge, should do so, holding as he has done, an important position on the bench and in this House. I say there is no evidence at all here that justifies this woman in leaving her husband or seeking a divorce. I am sorry that I have taken up the time of the House in this matter, but I could not give a silent vote on such an important question. I believe I have taken the right position in this matter—a position which is justified in a moral and social sense, and justified by the law that we have before us. If this Bill is passed the consequences will be deplorable. If you tell a woman that she can leave her husband—her husband who has been so kind, and so indulgent in everything except in staying out late at night, letting her go when and where she pleased, living at the Windsor Hotel, and in a spacious mansion he had provided for her—if, under such circumstances, you are going to allow a woman of nervous temperament and vivid imagination, to be separated from her husband on the slightest grounds—you will have this Senate flooded with applications. When the people outside know that we are governed by no law here, and that everybody will be guided by his own caprices and fancies, we will have the flood gates of immorality open on the land, and instead of this House being occupied with proper legislation, we will have before us cases like this, which do not tend to the security or the improvement of society.

HON. J. J. C. ABBOTT—I did not really intend to address the House on this subject, believing that every gentleman present, having read the evidence and acquainted himself thoroughly with the facts would be competent to arrive at a conclusion on this

subject, and would require no advice, or assistance, or argument from me to aid him in taking the right course ; but I feel that I should not give my vote in the face of statements which have been made respecting this case and respecting the law applicable to it, without explaining the position which I hold, and in doing that I must necessarily review, as briefly as I can, the facts of the case, and enquire what is the law which governs this House in respect to matters of this description. While I listened to my hon. friend from Amherst, (Mr. Dickey), and my hon. friend from Lunenburg, (Mr. Kaulbach), I could not help wondering whether the amiable and mild-tempered young gentleman, who never did any harm but go out in the evening occasionally to play a game of whist, can be the man referred to in this evidence ! A large portion of the arguments of my hon. friends from Amherst and Lunenburg was directed to prove, or to try to convince the House that the report, which I presume everybody here has read who is going to pronounce an opinion on it established that he was kind and amiable and affectionate to his wife ; that there was nothing wrong with this young man at all, except that he occasionally went out in the evenings to a very respectable club to pay a rubber of whist, and that it is the poor woman who is to blame for the whole of it—she is hypochondriacal, on the verge of lunacy, as one hon. gentleman said, and more fitted to be treated as a lunatic than as a sane person ; that she by her coolness, bad temper and sourness towards her husband, drove him from the house ; and that he was therefore perfectly justified, within eight months of his marriage, in leaving her to herself night after night, coming home sometimes even as late as 8 o'clock in the morning, and forgetting altogether the duties which he owed to her. We have heard a good deal about justification—that he was perfectly justified in all this, because at some period or other (which is not proved in this evidence) she became melancholy, sad, and to some extent unsociable, and to some extent quick of temper. Was this before she was treated in this manner by her husband or afterwards ? Hon. gentlemen all assume that she was a person of this description when he married her ; then why did he marry her ? He was perfectly right, because she had money ; the man was not to blame for marrying a woman he did not love, because she had money, and he was not to blame for practically deserting her, because she turned out not to have a good temper. He was a most amiable man, and never did anything blameable. Was this the same person who told her that he was a thorough blackguard and did not wish to be different, that his life just suited him and that she had done the only thing that she could in leaving him ? Can this be the same man ? Can this kind and amiable husband be the same man who, on one occasion at least, gave



his wife cause to say this of him—"I have been treated with what amounted to me cruelty; but I cannot say that I had ever received any actual violence; and although he at at times had very violent fits of temper, and would sometimes threaten people's lives, and cursed his father terribly to me in private, he only once threatened me with violence, and then I ran away and he could not do it." This is the amiable young man who went out occasionally to play cards, because his wife was unsociable and not as amusing as she used to be! Now we should leave all these efforts at exaggerating or distorting the evidence, and try to get at a rational and calm view of what the actual state of the facts is, as shown by the evidence. I shall endeavour to state them without exaggerating on one side or the other. I do not propose to represent either party as a saint or angel, but I am going to take the facts, which I think justify the line I intend to pursue in voting. Before that, I think it would be well to consider under what law we are going to decide this matter. My hon. friend from Lunenburg accuses those who are in favour of this bill of ridiculing the Supreme Court of the Province of Quebec, of treating it with contempt. I do not find anything in the evidence, or in the discussion, to support that pretension at all. The case which was tried at Montreal was taken under a special law of the Province of Quebec, and the judge no doubt gave a correct judgment upon the evidence before him. We do not know what evidence was submitted to him, but we do know this, that the wife's evidence was not before him. The wife was examined, but every gentleman from the Province of Quebec, whom I address here, knows how one of the parties to a record can be examined by the other party. There she can be called up on interrogatories—*fait et articles*, or examined by the other side; but she is not allowed to be examined by her own counsel on her own behalf, except to explain any fact stated by her in the examination on the other side. So that the detail of circumstances that we have before us in this record, could not have been before the judge, and if by some extraordinary accident it could have got before the judge—which is quite incredible—the judge had no right even to read it, except to enable him to judge that it was something in her own favour and which he must therefore disregard. So that clearly we are offering no contempt or disrespect to the Quebec courts or to the Quebec law. I would be among the first to stand up in this House and defend that system and those courts, because I know what they are; I have been bred in them all my life, and I know how to respect the equity and justice with which the laws of Lower Canada are imbued. Therefore I say that it has no foundation at all, and can only have been used as an argument which might induce some of our friends in the Province of Quebec, to think they are vindicating their laws by

voting against this bill. Such would not be the case in the slightest degree. It must be observed in connection with that, that we cannot be acting under the law of Lower Canada in dealing with divorce, because divorce is not allowed under the law of Québec. The very fact that we are considering this case, shows that we are not acting under the law of Lower Canada, because that law does not recognize divorce at all. Under what law are we acting? I do not know of any statutory provision, or anything in the constitution, which declares what shall be a sufficient cause for divorce or what shall not. I am told that we go to the House of Lords for our precedents in that respect. I would ask the House to consider at what period we are to look for these precedents? Shall we go to the time when a man was granted a divorce because he wanted a male heir? Is that the time? Or must we go to the time when a woman was refused a divorce, although it was proved that her husband had been guilty of adultery in the marital residence, and that he had horsewhipped his wife, and treated her otherwise with the utmost brutality? Is that the precedent which shall guide us? The House of Lords never granted divorces to women except in two or three cases, and for a time refused them altogether, and when the House of Lords, thirty years ago, practically ceased to deal with these cases, it had not reached by many degrees the point which the divorce law of England has attained even at this time. The law which was passed in 1857, that is 31 years ago, recognizes only adultery with cruelty: and that is the law to-day, if I recollect right, though I do not profess to know the law of England which prevails in the Divorce Court there—a principle established 31 years ago by a Parliament which had held such doctrines with regard to women as I have stated. What kind of respect or feeling could men have had for women—what kind of rank did they allow them in the social scale—who decided that a woman whose husband had committed adultery in his own house and had horsewhipped her like a slave, was not entitled to a divorce? Is that the kind of precedent to which we are to refer? I must say, and we all perceive by what no doubt every hon. gentleman knows and by what I have just mentioned, that the House of Lords was in a progressive condition up to the time it ceased to deal with divorce cases. It was better in 1858 than it had been in 1801, a great deal better. It was progressive; are we not progress? Are we to take the law forever and for all time as it was laid down in England prior to 1857 and 1858? I think not (o).

(o) *Stare super antiquas vias* is a wise suggestion, but in accepting it as a rule of action, the *vias* is to be understood as safe and true ways, in morals and in legislation, and newer and better pathways are to be follow-

ed when found—that in effect is the ground taken by Senator Abbott. He evidently agreed with the views of a previous speaker—that we never bound ourselves to accept the decisions of the House of Lords as

I think if we are to take the House of Lords as our exemplar, we must at the same time adopt the principle which prevailed in that body, that is to say, we must recognize the spirit of the age and allow it to soften the rigour of the law as administered a century ago. We must relax that rigour, and administer it now in harmony with the principles which now govern christian society ; in conformity with which we are every day regarding woman from a higher and better point of view—we are gradually increasing our respect for her position, and more generally acknowledging her equality in every sense with man. This was once so much disputed in England that learned judges have found it necessary to declare, that in their opinion a woman was equal to a man in

authoritative and conclusive ; following their precedents only where they commend themselves to our judgment. Appreciating the fact of moral progression in that body, he naturally asks "are we to stand still?" What are their precedents but instances of legislative action—and our power to enact is as ample as theirs. Free to act upon our own convictions of what is just—what will best guard public morals and the interests of society? We are not blindly to follow, where justice, purity and safety point to another way. It may well be said our great "Prototypes" are *progressive*. The history of legislation amply proves it. The Lords and Commons of England wisely left old paths in the many reforms made in our Criminal law. They were progressive, when they gave prisoners the assistance of counsel ; when they altered the laws under which men could be cruelly tortured if they refused to plead, and convicts executed because they could not read, and certain "executions were attended with butchery that would disgust a savage ;" when they changed the laws under which the life and honor of the accused could be made dependent on the wager of battle : when corruption of blood was done away ; when the disproportion in the punishment of minor offences and grave crimes was altered and the sanguinary character of the penal laws effaced ; when the system of prison discipline was altered and improved ; and who will gainsay a wise *progression* when the mischiefs, the fictions and the uncertainties of a highly artificial system of civil jurisprudence were dealt

with, so as to promote efficiency in administration and the general good when English "laws were divested of their Norman rags,"—then indeed the *via antiqua* were pretty well obliterated in a sweeping reform. And so it was when the law of libel was changed, the law of evidence improved, and many other changes made as knowledge and Christian civilisation advanced, and evils, the outcome of cruelty, tyranny and impurity, were laid bare.

The Provinces of Canada, too, set out with the law of England as their rule of decision, but they did not take it "for all time as their guide"—as something too sacred to be touched. They, too, altered and advanced, even anticipating the Mother Country in very many valuable reforms in civil and criminal law. As in England we were progressive and adapted our legislation to a better mode of thinking, more enlightened views of duty and responsibility—and in respect to matters of Christian ethics, as Senator Abbott urged, "are we not to progress," must we not "recognize the spirit of the age and allow it to soften the rigor of the law as administered a hundred years ago," should we not "relax that rigor and administer it now in harmony with the principles which govern Christian society." These views commended themselves to the Senate—the Bill passed.

Indications are not wanting of a healthy change in public sentiment in England of late years in the direction of justice to the woman, and it will, the writer believes, before long find legal expression in the Mother land.

all respects and entitled to the same treatment. No one here would think of laying that down as an axiom, because every one knows, and feels, and assumes it to be the case. If we have progressed in our respect for the position of women; if we have recognized that they hold a higher and more dignified position—a position of greater equality than was recognized long ago—surely we are to do as the House of Lords did, when it was making some progress—we must progress too. We must make our judgments and render our decisions or pass our laws—because that is the proper phrase to use—in harmony with the times, and the improved position of woman, and with the purity which we attribute to her, and which we desire she should preserve, and with the preservation of the social and family relations which I hope we desire more and more to render perfect, as far as we can. The crime of adultery has been recognized, I think, by this House constantly, as a ground for divorce. I venture to say that there are many decisions of this House on the subject of divorce in favor of women, which would not be sustained either by the precedents of the House of Lords which hon. gentlemen have cited, or by the decisions of the Divorce Court in England, because we have repeatedly granted divorces for adultery where no cruelty was proved—so I am told; I am not so familiar with the practice of this House as other hon. gentlemen are, but if I am wrong I can be easily corrected. If that be the case then, if in point of fact, we have abandoned the unequal and oppressive rulings of the House of Lords with regard to wives—the depreciatory view with which the House of Lords took of the position of women—if we have abandoned that, I have proved all I desire to prove, namely, that this House is entitled, on a question of this kind, to take the circumstances of the case before it; and assuming as a basis that adultery is a basis for a bill of divorce—which I am quite prepared to accept as a proper principle on that subject—then I think we are entitled to look at the circumstances of the case and judge, calmly and impartially, how far the adultery, if it be proved, coupled with these circumstances, justifies our passing a bill to relieve this woman from this tie. That is the view I take of my duty here, and it is on that construction of it I shall vote. Now, what are the actual unadorned facts of this case? I would like to be permitted to state them as I understand them, in order that if I am wrong, I may be corrected; and, if I am right, that they may produce the effect which they are entitled to. The first proposition of those who oppose this bill is, that this woman deserted her husband without sufficient cause. Now, what were the causes of her desertion? The cause of her desertion, shortly stated was this: that she became slowly convinced by what she heard from her husband, principally, and from his conduct from time to time, that he was unfaithful to her. That is what she

swears to, and she tells how she became convinced of this. In the first place from what he said himself, and by his constant absence at night, sometimes all night; and in the second place by the construction which he himself put on these absences. What did he say about that? I have just read one of the statements which the Respondent made to his wife as she has proved, and she also swears to numerous other statements of similar purport; and I take what she has sworn to as proof, because it was easily to be contradicted if it was not true. It was not necessary that he should blacken his wife's character in order to state the truth. And I do not think he showed the nobleness of character attributed to him by one hon. gentleman, by abstaining from telling the truth. He told her from time to time, that he was thoroughly bad; he told her that he was a thorough blackguard, and that he did not want to be anything else—that his way of life suited him.

HON. MR. POWER—That was after she deserted him.

HON. MR. ABBOTT—He told her on that occasion also that she was quite right in leaving him. When she observed his debauched appearance, he said to her it was caused by wine and women. I judge from the evidence that she was of a retiring disposition. She expresses herself in that way. She is evidently unwilling to come out and state in the broad language of the streets what she found her husband did. She says, it is too horrible for a woman to be made to talk about such things. A gently nurtured woman, being asked in a room full of men what she had discovered, will not answer with the same candour that a woman of a different character will. The lady had a repugnance to going into details of her husband's conduct, but she told enough. Hon. gentlemen will see from the evidence, in too many cases for me to repeat the number of times, that it is perfectly plain he communicated to her, and she so understood him, that he was a thoroughly immoral man. And the justification which he admitted to her she had for leaving him, what could it have arisen from? She left because she knew, and he knew, that he was unfaithful to her, and he tells her she was perfectly justified in doing so. Now, is there any evidence to prove, apart from what he told her, that she was justified in that belief? Let us see what are the facts with regard to the brothel that he was met coming out of. Some hon. gentlemen who oppose this bill seem to think that no importance should be attached to that; that a man be met coming out of a brothel at 11 o'clock at night, with two or three other persons, and that it counts for nothing. I contend that that of itself, in the absence of any explanation, is sufficient for this House to decide upon, or for any court or jury to decide upon, that he was guilty of adultery. Hon. gentlemen talk of law books and citations! I can cite half a

dozen cases in a moment, to prove that that is a fact upon which a court is entitled to *infer* adultery, if not satisfactorily explained. Now, how is this incident satisfactorily explained? A woman of the house is brought up as a witness.

HON. MR. POWER—Brought by the prosecution.

HON. MR. ABBOTT—Not therefore necessarily a perjurer—I give him the benefit of all the evidence the woman gave. I do not assume that the witnesses were brought on the one side or the other to perjure themselves. It would have been easy for the respondent to have explained this circumstance of being in that house of ill-fame, if he had chosen to do so, but he did not. My hon. friends say that this woman exculpated this man, the respondent; that her evidence shows that nothing improper happened on that occasion. She says she knew him—that she met him there on this occasion, and that he knew the other girls in the house “just like the other gentlemen;” and she is asked if on that occasion he had anything to do with any of them, and she says “not that I know of.” Now, if he knew all the other girls like the other gentlemen, is not that a circumstance of some importance? How did he know them if he did not frequent the place? This girl says she met the respondent there, and he was talking to the other girls, and that he knew them as other gentlemen knew them. That is the language I think she used—at all events it is near enough for the purpose. This man, in 1879, knew the girls in a brothel as other gentlemen knew them, and he was there at 11 o’clock at night! She does not deny that he had not something to do with any of them. The evidence is clear that it was not his first visit there, as the witness says he knew the girls there as other gentlemen did. Now, leaving argument out of the question, what would any sensible, straightforward man think the respondent was doing there at 11 o’clock at night? What was his business there? Had he ever been there before? What can one say his business was? I assume he was there to assist in carrying on, in one sense, the business which one of those ladies, I am told, said would suffer because of her absence here giving evidence. He could not have been there for any other purpose. He might have been there for a benevolent purpose, but that would be inconsistent with what the witness says of him, what he says himself, and what the evidence discloses about him. He had an opportunity of standing up before that committee, and could have said “I went in there with two or three friends. I never was there before, and I did not do anything wrong.” That would not have blackened his wife’s character, as some hon. gentlemen seem to contend it would. The reason why the man would not come forward they say was that “he was too noble to go into the witness box and blacken his wife’s character.” It would not have blackened his wife’s character; it would have helped to whiten his own; and he

should not have done less than come forward and say why he was there on that occasion. He might have said perhaps that he went there to try to convert these young women from the error of their ways, or for some other innocent or benevolent purpose ; but I say, in the absence of any statement from him, and with the fact that he was there, and that he knew those girls like any other of the gentlemen who frequented the place, that no witness has proved that he did not on that occasion have something to do with some of those girls at that late hour of the night ; in view of all these things I say, what can any honourable and candid gentleman judge took place on that occasion ? If we are sitting here to judge of the facts as the Committee have done, and as seven out of nine of the Committee have decided, I for one must decide, and I think most of those who hear me, will decide, that the wife was justified in believing what she believed ; and that she was justified in believing from the man's own statement, that he was unfaithful to her. Therefore, on the theory of my hon. friends who are opposed to the bill, she was justified in leaving him. If I am right in that, and I am convinced that I am right, that must put an end to the whole of the objections to this bill ; but for my part I must state plainly that I should not tie myself down to that as the sole reason for voting for this bill. I am prepared to say that the proof of adultery by a married person, even after separation from each other, coupled with other circumstances, may be a good ground for divorce, unless the conduct of the woman was such as to render her unworthy of relief. That is the view I take of it ; that is a view on which, if necessary, I would act in this case, and it is my conscientious view (*p*). No hon. gentleman will say that this woman did anything that renders her worthy of relief at our hands. She has taken care of her children, boarded them and educated them at her own expense since she left her husband. I have spoken of the causes which led her to leave him. I do not know what hon. gentlemen think. I do not press them to think as I think, one way or the other ; I merely wish to

(*p*) The sound principle which the Leader of the Senate thus boldly enunciated very soon after received ample endorsement in the decision of the Lambeth Conference (see note 4, page 202-3). It was a worthy utterance for, in the eloquent words of Mr. Gladstone. "If there is one broad and palpable result of Christianity, which we ought to regard as precious, it is that it has placed the Seal of God Almighty upon the equality of man and woman with respect to everything which relates to their rights."

But the principle found expression even in the philosophy of Ancient Rome—*Musonius* a Stoic philosopher, who flourished at the time of Nero, taught that the whole of civilization rests upon the institution of marriage, and held that what was wrong in a woman was equally wrong in a man, or rather more disgraceful to a man, inasmuch as he claimed to be the stronger being and therefore more capable of controlling his passions.

place before them my view of this evidence, as a justification for myself in their eyes for voting as I do. Even if it were not to my mind proved as nearly with certainty and conclusiveness as circumstantial evidence will go, that he was guilty of unfaithfulness to her while living with her, then I should say I would be equally determined to vote for this bill, because after consideration of all the circumstances, I believe she did nothing which in my own eyes renders her unworthy of that relief. The adultery after the separation is of course proved. It is not disputed. The only argument I have heard with regard to that, is that the respondent was perfectly justified in it because his wife was not living with him ; and we are told that if we allow a woman to be divorced because a man is guilty of adultery after she separates from him, we shall be opening the door to all kinds of profligacy. But how are we going to encourage immorality by granting this woman a divorce ? People might say we are going too far in punishing immorality, but certainly no one can say we are encouraging immorality in punishing a man who has been guilty of adultery.

HON. MR. KAULBACH—Does not a woman who leaves her husband without cause contribute to his adultery ?

HON. MR. DEVER—Will the hon. gentleman explain to me the last line but one on page 3, the petitioner's evidence, where she is asked, " Were those suspicions confirmed ? "

HON. MR. ABBOTT—Her reply is, " I unfortunately had no knowledge of any facts. " That is quite consistent with the whole statement. She had not at that time investigated her husband's conduct. I just ask the hon. gentleman to consider this fact, that she did know, that her husband had admitted it. My hon. friend thinks nothing of that ; that is of no consequence ! If she did not see him in the act, had she no right to leave him ? If she was to believe what her husband said to her on that subject, she must have been convinced of his guilt. When a man blackens himself he is generally believed, and if she believed what he said to her, she was justified in believing that he was unfaithful to her. Now I am not disposed to go into any question of sentiment in respect of this case. I think sentiment is misplaced ; but I think when we as legislators—not as judges acting under a fixed rule of law laid down for our guidance, because we have none such—I say without the least hesitation, that we as legislators, in deciding whether or not we will give this woman the relief she asks for, must consider the surrounding circumstances and must consider also the arguments which hon. gentlemen opposite offer against our exercising our discretionary power, whatever it may be in the direction of granting this bill. Hon. gentlemen say " what will be the condition of those unfortunate children if the divorce is granted ? " But I ask hon. gentlemen what will it



be if the divorce is refused? Two young girls of 13 or 14 years will be placed under the control of a man who is proved in the record to have been frequenting house of prostitution and having criminal connection with prostitutes within a fortnight of the time they gave their evidence here. One woman when asked said it was a week ago last Saturday night; the other fixed last Thursday week—and the result of our refusing relief to this Petitioner would be to place those two young daughters under the control of a man, who two weeks ago, is proved guilty of frequenting houses of ill-fame, and co-habiting with prostitutes. How can hon. gentlemen be so misled by a fancied appreciation of texts of law as to think that we are doing those children an injury by protecting them from being placed in such contaminating contact with this man? Here is their mother able and willing to support them, educating them at this moment and supporting them out of her own means, and we are asked to consider that it would be a misfortune to the children to be allowed to continue under the control and training of their mother, and that we should by preference place them under the control of a man who describes himself as a thorough blackguard, who does not want to be anything else; and who says his mode of life suits him. I do not see how my hon. friends can use such arguments in connection with such facts, I cannot see how hon. gentlemen can appeal to us against those children being retained by their mother, insisting that we shall thereby do them an injury, and that it will be to their advantage to be placed under the control of their father. I do not know by what process of reasoning they arrive at that conclusion, unless they have argued themselves into it by pondering over texts which they find in law books, which are applicable only to cases entirely different from this. I do not see how they can imagine for a moment that it would be better for those children to be placed under their father's control, than under their mother's control. These are the considerations, not dealing with the minor points, which lead me to support this bill. I shall certainly vote for it, and I shall hope that it will be carried; but the fact that it is not carried, will not convince me that this woman is not justified in getting relief that will free her and her children from the control of this man.

The House divided on the motion, which was agreed to on the following division: Contents, 32; non contents, 19.

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## APPENDIX.

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### FORM OF APPLICATION FOR SUMMONS TO WITNESS.

THE SENATE OF CANADA.

*Session*                      *Parliament*                      *Victoria*                      188

#### APPLICATION FOR SUMMONS TO WITNESS.

*To the Clerk of the Senate,*

SIR,—In the matter of the Bill intituled “An Act for the Relief of

On behalf of the                      in this matter I have the honor to apply for a summons under the hand and seal of the Speaker of the Senate, to command the attendance of the following persons, on                      day the                      day of                      inst., before the Select Committee on Divorce, to whom the said Bill has been referred, to give evidence on behalf of the                      , to wit of (*Here specify names in full, occupations and residences of witnesses.*)

Ottawa

188

Attorney for

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### FORM OF SUMMONS TO WITNESS TO APPEAR AND GIVE EVIDENCE.

THE SENATE OF CANADA.

*Session*                      *Parliament*                      *Victoria, 188*

In the matter of the Bill intituled “An Act for the Relief of

To (*Here state names, residences and occupations of each of the witnesses.*)

WHEREAS a Bill intituled “An Act for the Relief of  
” has been read a second time in the Senate of Canada, and has been referred to the Select Committee of the Senate on Divorce, to the end that witnesses may be heard on oath touching the matter of the said Bill and of the Petition of the said                      for an Act to divorce                      from

AND WHEREAS application hath been made to the Clerk of the Senate for this summons, and it hath been made to appear to me the Speaker of the Senate that you are and each of you is likely to give material evidence on behalf of the said

THESE ARE THEREFORE to command you and each of you to be and appear before the said Select Committee of the Senate of Canada at the Parliament Buildings in the City of Ottawa, Province of Ontario, on       day, the       day of       at       of the clock in the       noon, and so on from day to day until discharged, to testify on behalf of the said

what you and each of you know concerning the matter of the said Bill and Petition.

AND herein fail not under the penalty upon each of you of imprisonment by order of the Senate.

GIVEN under my hand and seal this       day of       in the year of Our Lord, one thousand eight hundred and eighty at the Senate Chamber in the said City of Ottawa.

*Speaker of the Senate.*

POWER OF ATTORNEY when service is made by a Deputy of the Gentleman Usher of the Black Rod.

I,       Gentleman Usher of the Black Rod, in virtue of the power contained in my Commission, do hereby appoint       of the       of       in the County of       my Deputy for me and in my name to serve the within Summons, upon the persons therein named and described.

WITNESS my hand and seal at the Senate in the City of Ottawa, Province of Ontario, this       day of       A.D. 188

*Gentleman Usher of the Black Rod.*

#### RETURN OF SERVICE.

I,       of the       of       in the       of       do solemnly declare

That, under a Power of Attorney from

Esquire, Gentleman Usher of the Black Rod, of the Senate of Canada, I did on the       day of       A.D. 188 , personally serve (*Here state names, residences and occupations of each of the persons served ; also the day and place of service in each case.*) the person described in the foregoing Summons, with a true copy thereof.

That to effect such service I necessarily travelled  
miles from                      to the                      of                      and  
thence to

And I make this solemn declaration, conscientiously believing  
the same to be true and by virtue of the Act respecting "Extra Ju-  
dicial oaths."

Declared to before me, etc.

— — —

SUMMONS TO A WITNESS TO APPEAR AND PRODUCE DOCU-  
MENTS.

THE SENATE OF CANADA,

*Session,                      Parliament,                      Victoria, 188*

In the matter of the Bill intituled "An Act for the Relief of

To                      of the                      of                      in the  
County of                      Province of                      (*Here insert occupation of*  
*Witness.*)

WHEREAS a Bill intituled "An Act for the Relief of  
" has been read a second time in the Senate of  
Canada, and has been referred to a Select Committee thereof to  
the end that witnesses may be heard on oath touching the matter  
of the said Bill and of the Petition of the said  
for an Act to divorce                      from

AND WHEREAS application hath been made to the Clerk of the  
Senate for this summons, and it hath been made to appear to me  
the Speaker of the Senate that you have in your possession certain  
documents relating to the said matter and that you are likely to  
give material evidence on behalf of the said

THESE ARE THEREFORE to command you to be and appear  
before the said Select Committee of the Senate of Canada at the  
Parliament Buildings in the City of Ottawa, Province of Ontario,  
on                      day, the                      day of                      at                      of the  
clock in the                      noon, and so on from day to day, until dis-  
charged, to testify on behalf of the said

what you know concerning the matter of the said Bill and Petition ;  
AND ALSO to command you to bring with you and produce at the  
time and place aforesaid the following documents ; (*Here describe*  
*the documents to be produced.*)

AND herein fail not nor omit in anywise under the penalty of imprisonment by order of the Senate.

GIVEN under my hand and seal this                      day of  
in the year of Our Lord, one thousand eight hundred and eighty  
at the Senate Chamber in the said City of Ottawa.

*Speaker of the Senate.*

POWER OF ATTORNEY from Gentleman Usher of the Black Rod  
and RETURN OF SERVICE as in the immediately preceding sum-  
mons.

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FORM OF NOTICE TO PRODUCE.

THE SENATE OF CANADA.

In the matter of the petition of John Smith, of the City of Ottawa, in the County of Carleton, in the Province of Ontario, merchant, for an act of divorce from his wife Sophia Smith, who was previously to her marriage with him, named Sophia Wilson, upon the ground of adultery with one A. B., as specified in such petition.

To the said Sophia Smith, formerly Sophia Wilson,—

Take notice that you are hereby required to produce before the Parliament of the Dominion of Canada, and before the Select Committee on Divorce, before whom such petition shall be pending, and particularly before the Senate of said Dominion, and all Committees thereof, before whom such petition shall be pending, at the Parliament House in the City of Ottawa, in said Dominion of Canada, on and after the 16th day of May, A.D., 1872, all letters and correspondence, documents and writings received from you by said A. B., during the years 1867 and 1868, and thenceforth until the service hereof upon you, and returned to you, and now in you possession or control; and also all letters, correspondence, documents and writings, during that time received by you from said A. B., and also all letters, correspondence, documents and writings received by you during those years from the said John Smith; and particularly that one thereof written by him and delivered to you by C. D., in the month of May, 1868, or thereabouts; and also all letters, correspondence, documents and writings in any manner relating to the matters mentioned in such petition for divorce.

JOHN SMITH,

The above named petitioner.

Dated this 6th May, A.D., 1872.

## FORM OF NOTICE OF SECOND READING.

## SENATE.

In the matter of the Bill intituled : "An Act for the Relief of John Smith," pursuant to the following order passed by the Senate on the sixteenth day of April, A.D., 1888, to wit :

ORDERED,—

That the said Bill be read a second time on Tuesday, the first day of May next, and that notice thereof be affixed on the doors of this House, and the Senators summoned ; and that the said John Smith may be heard by his counsel at the second reading to make out the truth of the allegations of the said Bill, and that Mary Smith may have a copy of the said Bill, and that notice be given to her of the said second reading, or sufficient proof adduced of the impossibility of so doing, and that she be at liberty to be heard by counsel what she may have to offer against the said Bill, at the same time ; that the said John Smith do attend this House on the said first day of May next, in order to his being examined on the second reading of the said Bill, if the House shall think fit, whether there has or has not been any collusion directly or indirectly on his part, relative to any act of adultery that may have been committed by her to obtain such separation, or whether there be any collusion, directly or indirectly, between her and him, or any other person or persons, touching the said Bill of divorce, or touching any action at law which may have been brought by him against any person for criminal conversation with her, the said wife of the said John Smith, and also whether at the time of the adultery of which he complains, she was by deed or otherwise by his consent living separately and apart from and released by him, as far as in him lay, from her conjugal duty, or whether she was at the time of such adultery, cohabiting with him, and under the protection and authority of him as her husband.

Notice is hereby given that the said Bill will be read a second time on the first day of May next, 1888.

Attest.

*Ottawa, 1888*

*Clerk of the Senate.*

## FORM OF BILL WHERE HUSBAND IS PETITIONER.

An Act for the relief of Andrew Maxwell Irving.

Whereas Andrew Maxwell Irving, of the City of Toronto, in the Province of Ontario, clerk, has, by his petition, humbly set forth that on the thirty-first day of August, in the year of Our

Lord one thousand eight hundred and eighty-five, he was married to Marie Louise Irving, formerly Marie Louise Skelton ; that there was born of the said marriage one child, still living ; (*name, sex and age of child should be stated*) that on the first day of October, one thousand eight hundred and eighty-seven, the said Marie Louise Irving deserted her said husband and went to the City of Buffalo, in the State of New York, and has not since the first day of October, one thousand eight hundred and eighty-seven, resided with the said Andrew Maxwell Irving ; that shortly after the said Marie Louise Irving deserted him as aforesaid, he the said Andrew Maxwell Irving discovered, as the fact was, that the said Marie Louise Irving had been leading an irregular life and had been committing adultery with divers persons during the months of July, August, September and October, in the year of Our Lord one thousand eight hundred and eighty-seven ; and whereas the said Andrew Maxwell Irving has humbly prayed that the said marriage may be dissolved so as to enable him to marry again, and that the custody of the said child may be given to him, and that further relief may be afforded him as may be deemed meet ; and whereas the said Andrew Maxwell Irving has proved the allegations in his said petition, and has established the acts of adultery therein set forth, and it is expedient that the prayer of the said petition should be granted : Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

1. The marriage between the said Andrew Maxwell Irving and the said Marie Louise Irving, his wife, is hereby dissolved, and shall be from henceforth null and void to all intents and purposes whatsoever.

2. The said Andrew Maxwell Irving may at any time hereafter, contract matrimony with any other woman whom he might lawfully marry in case the said first mentioned marriage with the said Marie Louise Irving had not been solemnized.

3. In case of the said Andrew Maxwell Irving hereafter marrying any woman whom it would have been lawful for him to marry if he and the said Marie Louise Irving had not intermarried, and of there being any issue born to him of such subsequent marriage, the said issue so born shall be and the same are hereby declared to be to all intents and purposes legitimate and the right of them, the said issue, and each of them, and their respective heirs, as respects their and each of their capacity to inherit, have, hold, enjoy and transmit all and all manner of property, real or personal, of any nature or kind whatsoever from any person or persons whomsoever, shall be and remain the same as they would have been, to all intents and purposes whatsoever, if the marriage between the said Andrew Maxwell Irving and Marie Louise Irving had not been solemnized.



## FORM OF BILL WHERE WIFE IS PETITIONER.

An Act for the relief of Eleonora Elizabeth Tudor (*q*).

Whereas Dame Eleonora Elizabeth Tudor, of the City of Montreal, in the Province of Quebec, wife of Frederick Levey Hart, of the same place, gentleman, hath, by her petition, set forth that, on the fourth day of October, one thousand eight hundred and seventy-one, she was lawfully married at the City of Boston, in the State of Massachusetts, one of the United States of America, to the said Frederick Levey Hart; that they cohabited together as husband and wife until the year one thousand eight hundred and eighty-four, when the said Frederick Levey Hart became a constant and habitual frequenter of houses of ill-fame in the said City of Montreal, and committed adultery with certain women named in the evidence; that the said Frederick Levey Hart has ever since continued to live apart from the said Eleonora Elizabeth Tudor, and has by his said conduct dissolved the bonds of matrimony on his part; and that there were born of the marriage of the said Eleonora Elizabeth Tudor with the said Frederick Levey Hart four children now living, namely, Mary Edith Effie Tudor Hart, aged about fifteen years, Ernest Percival Tudor Hart, aged about fourteen years, Edith Ethel Alice Hart, aged about eleven years, and William Owen Tudor Hart, aged about three years; and whereas the said Eleonora Elizabeth Tudor has humbly prayed that the said marriage may be dissolved and that she be authorized and empowered to marry again, and that she may have the custody and sole and absolute control of the said children, Mary Edith Effie Tudor Hart, Ernest Percival Tudor Hart, Edith Ethel Alice Hart, and William Owen Tudor Hart, issue of her marriage with the said Frederick Levey Hart, and that such further relief may be afforded her as may seem meet; and whereas the said Eleonora Elizabeth Tudor has proved the allegations of her said petition, and has established the adultery above mentioned, and it is expedient that the prayer of her said Petition should be granted: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. The said marriage between the said Eleonora Elizabeth Tudor and Frederick Levey Hart, her husband, is hereby dissolved, and shall be henceforth null and void to all intents and purposes whatsoever.

(*q*) It seems to have been the practice in England to describe the wife by her maiden name. Thus in the Dyott Divorce Amending Act 1816-17, the wife is described as Eleanor

Thompson. In the earlier Canadian cases the wife has been described by her husband's surname, but latterly the practice has been to describe her by her maiden name.

2. The said Eleonora Elizabeth Tudor may at any time hereafter marry any man whom she might lawfully marry in the said marriage with the said Frederick Levey Hart had not been solemnized.

3. The said Eleonora Elizabeth Tudor shall have the permanent custody and sole and absolute control of the persons of her said children, Mary Edith Effie Tudor Hart, Ernest Percival Tudor Hart, Edith Ethel Alice Hart, and William Owen Tudor Hart, without any right of interference whatsoever on the part of the said Frederick Levey Hart.

3. In the case of the said Eleonora Elizabeth Tudor hereafter marrying, she and the man whom she so marries, and the issue, if any, of such marriage, shall have and possess the same rights in every respect as if her said marriage with the said Frederick Levey Hart had not been solemnized.

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#### MARRIAGE AND DIVORCE.—THE DUTY OF CHURCH AND STATE.

The writer's attention has been directed to a work recently published by an Oxford M. A. : "Marriage and Divorce." Many of the views and conclusions of the author and his suggestions for enlarging the grounds for divorce, the writer entirely dissents from ; but what is said in one part of the work, as it touches the functions of Parliament, expresses, in the writer's opinion, sound and correct views. The extracts following will show in substance, what are these views on this important point—looking at divorce as a question of State, a question of Civil Government, as affecting all members of the Community universally, whether belonging to the Church, believing in the principles of the Church, or not. He observes :—

"The Church and the State are not co-ordinate and identical, "do not stand on the same foundation, and are not co-extensive in "their range of action. Every Church has a duty to perform to its "own members. \* \* \* It has certain religious principles \* \* "which it holds to be of importance ; \* \* \* it must naturally "consider it to be its duty and its mission, in its corporate capacity, "to inculcate these principles upon the members of its own body, "and to enforce obedience to them, by the exercise of spiritual discipline. \* \* \*

"But the State has no such function to perform ; it has "received no commission to teach any special tenets of religion ; it cannot, like a church, confine its operations to any one "limited body, but must deal with the whole community, with "every citizen, and deal with them on uniform and general principles."

“ples. The business of the State is to provide justly and impartially, as far as possible, for the welfare of all ; to repress vice and punish crime ; \* \* \* because these things are injurious to the well-being of the community; to guard the rights of all; \* \* \* for this, indeed, is one of the principal objects of social and civilized life, \* \* \* to guard the personal liberty of all its members, especially the liberty of conscience.

“Diversity of opinion on questions of religion must arise, if men are free to think about them. \* \* \* Let the churches hold their own doctrines and enforce their principles, so far as may be justly warranted by Scripture, on *their own members*, but not beyond : \* \* \* but let not the State enforce any special tenets of faith, etc., except such as may be generally accepted and approved of”—\* \* \* and the author sums up the subject in these words :—

“The Church and the State have distinct duties and functions to perform in relation to these questions in which religious principles are involved : the Church to teach and maintain its own doctrine and discipline among its own members ; the State not having any commission to teach or enforce religious dogmas, but only to maintain such fundamental principles of religion and morality as are generally accepted by the people, as being essential to the general welfare, and such as do not trespass on the conscience of any individual.”

In Canada, there is no connection between Church and State—all religious communities stand on an equal footing before the law. The State adopts “such broad principles as may suit the diversities of faith in the country, or at least, aims at this result as far as is reasonable and practicable,” it does not “force any special tenets of faith on grounds not generally accepted and approved.”

Protestants believe divorce right under certain circumstances ; the doctrine of indissolubility of marriage is held by Roman Catholics. The Constitution allows and provides for Divorce, and any attempt to hinder Protestants in obtaining relief, even by those who do not personally approve of the measure, seems not in keeping, the writer humbly conceives, with a just view of religious liberty.

The views on this point expressed by the Fathers of Confederation, seem on public ground, alike, just and necessary in our mixed community. (r)

(r) See remarks, *ante* pp. 28, 29.

## THE DIVORCE STATISTICS OF CANADA SINCE THE FEDERAL UNION IN 1867.

The policy of the Parliament of Canada, in the administration of Divorce, being to afford the public no facilities for obtaining divorces, and thus avoid all danger of our falling into the lax systems prevailing in many countries, a comparative table, showing the practical results of the two systems—the Parliamentary and Judicial—in Canada, will not be without interest. The writer has accordingly procured the Divorce Statistics of Canada and its Provinces for the past twenty years, and has arranged them in the following tables, which show the result at a glance, and the ratio of divorces granted in proportion to the population, and married people in the Dominion, as enumerated at the last Census taking.

DIVORCE STATISTICS FOR THE DOMINION OF CANADA  
FROM 1ST JANUARY, 1868, TO END OF 1888.*(No divorces granted in 1867.)*

	GRANTED BY PARLIAMENT.		GRANTED BY COURTS.		
	Ontario.	Quebec.	Nova Scotia.	New Brunswick.	British Columbia.
1868.....		1	3		
1869.....	1		1	2	
1870.....			2	1	
1871.....			2	2	
1872.....			1	3	
1873.....	1		3		
1874.....					
1875.....	1		4		
1876.....			1	2	
1877.....	3		5		1
1878.....	2	1	1	3	1
1879.....	1		1	2	
1880.....			3	2	
1881.....			2	2	3
1882.....			4	1	1
1883.....			3	7	3
1884.....	1		4	3	2
1885.....	4	1	4	3	
1886.....	1		4	5	1
1887.....	2	3	1	3	1
1888.....	2	1	3	1	2
	19	7	52	42	15

RECAPITULATION.—DIVORCES IN 20 YEARS.

Ontario.....	19
Quebec.....	7
Nova Scotia.....	52
New Brunswick.....	42
British Columbia.....	15
Prince Edward Island.....	0
Manitoba.....	0
North West Territories.....	0
Total for Canada.....	135

CAUSES OF DIVORCE IN CANADA.

	Ontario.	Quebec.	Nova Scotia.	New Brunswick.	British Columbia.	Total.
Adultery.....	18	7	44	39	14	122
Cruelty.....	1	.....	7	2	.....	10
Impotence.....	.....	.....	1	.....	1	2
Consanguinity.....	.....	.....	.....	1	.....	1
						135

NUMBER OF DIVORCES applied for by men and women respectively.

	MEN.	WOMEN.
Ontario.....	11	8
Quebec.....	2	5
Nova Scotia.....	24	28
New Brunswick.....	23	19
British Columbia.....	9	6
Total.....	69	66

TABLE showing ratio of divorces to the population and married people of Canada during the last twenty years on the basis of the census taken in 1881.

PROVINCE.	No. of Divorces	Populat'n.	Ratio of Div. to Population.	Married People.	Ratio of Div. to Married People.
Ontario.....	19	1,923,228	1 to 101,222	619,035	1 to 32,580
Quebec.....	7	1,359,027	1 to 194,146	436,342	1 to 62,334
Nova Scotia.....	52	440,572	1 to 8,472	135,654	1 to 2,608
New Brunswick.....	42	321,233	1 to 7,648	98,703	1 to 2,350
Prince Edward Island.....	0	108,891	.....	30,762	.....
British Columbia.....	15	49,459	1 to 3,297	15,821	1 to 1,054
Manitoba.....	0	65,954	.....	21,491	.....
North West Territory.....	0	56,446	.....	22,273	.....
Total, Canada.	135	4,324,810	1 to 32,035	1,380,081	1 to 10,222

## STATISTICS OF OTHER COUNTRIES.

The results from the establishment of a Divorce Court in England have not had the beneficial influence looked for by the advocates of the measure and recent returns to the Imperial Parliament "indicate what a great effect the Divorce Act of 1857 "has had in shaking the sanctity of the marriage vow." "It "appears," according to another writer, "that since 1857, 6,381 "decrees absolute for dissolution of the marriage tie have been "granted in the English Court. The number of decrees for judicial separation was 914. These figures seem very large compared with the statement that from the days of the Reformation in England down to the year 1857 the total number of divorces obtained by Acts of Parliament was 317. The cost of obtaining a divorce was always given as the reason why so few people applied to Parliament for relief. The Act of 1857 was intended to do away with what was termed in the demagogic talk of the day an injustice to the poorer classes. It does not appear that the Act has been much taken advantage of by those who were represented as being too poor to apply to Parliament. The number of petitions made since 1857, *in formâ pauperis*, was only 208, out of a total of 10,221 petitions (s).

"There are demands in the United States for a uniform law of divorce to be passed by Congress. The chief difficulty in the way of such an enactment is the belief that the law would be unconstitutional. The present state of affairs is, however, felt to be unsatisfactory where there are 46 different codes, and 30 causes for divorce admitted. The New York *Sun* declares that the prevailing sentiment is "manifestly in favor of greater "freedom of divorce," so that the future of marriage in the United States seems to be dark. We have every reason in Canada to be pleased at the firm moral tone of public opinion in all parts of the country in sustaining the sanctity of the marriage tie."

In connection with the foregoing, the remarks and divorce statistics of other countries used by Senator Gowan in his speech on the occasion of his Motion in the Senate for the appointment of a Committee to frame new Rules of Procedure will prove of interest (t).

"The subject of divorce I know has occupied the thoughts, "if it has not found full expression from the lips of very many "earnest Christian men in Canada, men who have looked with "horror and alarm upon the lax administration of the law, the "encouragements to divorce in other lands—wherein also was "the feeling of alarm and the warning voice heard—too late or "despised.

(s) See *Ante*, p. 24 for remarks of Sir J. A. Macdonald on this subject. (t) Senate Debates, 1888, p.p. 55-68.

"In France a system of lax divorce was established by the law of 1792, and was substantially confirmed by the Code but was abolished on the Restoration. From 1830 its re-enactment has been frequently pressed; in 1884 it was again established, and this with the experience of their own past, and in the face of the dire evils laid bare in the history and statistics of divorce in the United States. Within three months after the passing of the law of the National Assembly (for the encouragement, I may say, of divorce) almost as many divorces as marriages were registered in Paris, and in the whole Kingdom 20,000 divorces in eighteen months—a perfect deluge of immorality overflowing the country. Well might Abbé Gregoire exclaim. "*Vraiment cette loi ci veut bientôt desoler toute la Nation.*"

But what concerns us more closely, is the growth of the evil in the United States, a country with which we have such intimate relations and which borders us for some 3,000 miles. Hear what some of their own writers say.

A writer in a leading American journal some years ago, speaks thus :—

"The large number of divorces granted in the United States, the rapidly increasing number of applications for divorce, the *ever changing variety of causes of divorce*, and the strong disposition manifested by legislative bodies to afford every facility asked for a dissolution of the marriage contract, is engaging the earnest attention of moralists and thinking men."

A more recent writer says :

"Among the social problems which are forced upon us for solution none are more radical in their relation to society at large than the matter of divorce, none are charged with greater danger for the future of the United States. If the foundations be destroyed, what can the righteous do." \* \* \* "Recent statistics are appalling. Where we would least expect it, in New England, the land of the Puritans, the evil is assuming large proportions. The ratio of divorce to marriage in several States is now as one to ten, or even greater in some States, and in one State the ratio has, within twenty years increased from 1 to 51, to 1 to 21 ! \* In this city " (New York), "in only three of our courts, nearly 3,000 divorces have been decreed since 1870, and the number in 1882 was almost double that in 1872. Whereunto will this grow? Is it not time to sound the alarm, is not the marriage bond fast becoming a rope of sand?"

Amongst the causes stated for this terrible state of morals is the extreme laxity of divorce laws in several States by which every facility is afforded for annulling the marriage contract."

And the writer goes on to say—

"Our Courts have a duty on the case. In the interests of

"morality and public virtue they are bound to frown upon this growing laxity and lay a strong hand upon the evil to the full extent of their power. Also to take the lead in a movement for reform of State divorce laws, and to secure a national law that shall be uniform and wholesome in its operations." I quote from an able and well-known periodical, "The Homiletic Monthly," for November, 1883.

I will give another extract from the same publication for July, 1884, some facts and statistics which may well startle the virtuous and religious part of the community. "Connecticut granted 91 divorces in 1849—about one for each 35 marriages of the year. "In 1878, the annual average for 15 years had become 445, or one to every 10·4 marriages. Vermont granted 94 divorces in 1860, or one to every 23 marriages; and 197 in 1878, with a ratio to marriages of one to 14. Massachusetts, 243 in 1860, or one to 51 marriages; and 600 in 1878, or one to 21·4. In New Hampshire, there were 107 in 1860, and 314 in 1882. This latter year the ratio was one to 10·9; in the former it must have been about one to 31. Rhode Island recorded 162 in 1869, or one in 14 marriages; and 271 in 1882, the ratio becoming one to 11. There were 587 in Maine in 1880, probably one to at most 10, or possibly even 9, marriages. From such reports as other States give, a similar condition of things is found. The ratio of divorces to marriages in Ohio was one to 26 in 1865, while 1,806 divorces were granted in 1882, or one to 16·8 marriages. In the two most populous counties of Minnesota the ratio of divorce *suits* to marriages rose in ten years in the one county from one to 29·3 to one to 22·9, and in the other from one to 19 to one in 12. For six years the ratio of divorce *suits* begun in Cook County, Ill. (Chicago), to marriage *licenses* issued was one to 9·5. In 1882, the ratio of divorces actually granted was found to be one in 13·4, which is almost exactly the ratio for the year before in Louisville. St. Louis granted about 305 divorces in one year, and in the next, 430 suits were entered. San Francisco divorced 333 married pairs in 1880, and 364 the next year. Making the estimate of 9 marriages to 1,000 inhabitants, there were granted in that city in the latter year a divorce to each 5·78 marriages! Rev. J. E. Dwinell, of California, gives the statistics of 29 counties, out of 52 in that State, which show that 5,849 marriage licenses were issued and 789 divorces granted, or one divorce to 7·41 licenses. Yet counties in other States than California make as bad or a worse showing. Philadelphia, it is said, granted 101 divorces in 1862, 215 in 1872, and 477 in 1882. There were 212 in New York City in 1870, and 316 in 1882. Complete returns show that New England granted 2,113 divorces in 1878, and probably the number last year was still greater, notwithstanding important



"legislation which has reduced the number in some of these States. It is safe to say that divorces have doubled in proportion to marriages or population in most of the Northern States within thirty years. (u)

"From a recent report of the 'Italian Bureau of Statistics,' covering a period of ten years, we learn that the increase for each 1,000 marriages between '71 and '79 in France was from 4.46 to 9.14; in England and Wales, from .98 to 2.17; in Denmark, from 36.27 to 40.29. Between 1871 and 1880 Italy remained stationary; Belgium increased from 2.85 to 7.40; Holland from 5.20 to 7.35; Scotland from .11 to .29; Sweden from 4.96 to 7.50; and Roumania from 9.05 to 10.86. Switzerland has the highest figures in Europe. Her rate is about 46, but in some Cantons it is far higher. Other countries report for shorter periods. In Wurtemberg the increase is from 5.67 in 1876 to 12.25 in 1879; in Saxony from 21 in 1875 to 31.42 in 1878; in Thuringia from 14.33 to 17.48 in eight years; in Baden from 4.53 to 7.31 in seven years; in Alsace-Lorraine from 4.46 in 1874 to 7.85 in 1880; in Hungary from 6.74 in 1876 to 10 in 1880, and in Russia from 1.33 in 1871 to 2.05 in 1877. From these facts, as reported both from the Old World and the New, it is apparent that there is a rapidly rising tide of divorce among the progressive nations though the main swell and crest of this dark tidal wave is in America; and this is nowhere higher than where it breaks into the Pacific," and still later in the January number of 1886, of a "Monthly Magazine of Religious Thought and Discussions of Practical Issues," I find the following:—"The country begins to be pretty thoroughly aroused to the evils of frequent divorce and the necessity of wise and efficient measures to ward off the imminent danger to the family and to the State and Church as well. The evil has put on such fearful proportions during the last few years and chimes in so readily with the present demoralized condition of society, that only combined special and persistent measures will have the least chance of success."

"The National Divorce Reformed League," a most admirable association formed in New England in 1881, seems to be doing a great work in connection with auxiliary bodies having similar aims. Its membership includes representatives of all leading Christian bodies, Protestant and Roman Catholic, and it is conducted upon principles of Catholicity. The Rev. Wm. Dike, the corresponding secretary of the society, an able, earnest and energetic man, is doing a noble work, and under many difficulties

(u) From a Return of Divorce Statistics, just presented to the U. S. Congress, and which the author has not yet seen, it appears that several hundred thousand divorces have been

granted in the whole American Union in the same period in which only 135 have been granted in the whole of Canada, as shown *ante* page 257.

diffusing information and arousing public attention to the nature and extent of the evil. The influence of the society he is connected with, mainly through his restless efforts, has, in the United States, been widely felt, and it has been the means of securing more stringent regulations in respect to divorce in several of the States.

I might go on for an hour citing the opinions of great and good men in the neighboring Union and multiply statistics going abundantly to show the evils of lax divorce laws and a still more lax administration, abounding in frauds. I could tell of alluring notices by "divorce brokers guaranteeing secrecy and speed in securing a divorce for citizens of any State or country—advice "free"—invitations to our people to "cross the lines," come back as divorced and call themselves free: but I have said enough to show the utter demoralization—the low, ante-Christian views which prevail respecting the marriage state and the family. And "if the family be struck down, the foundations are destroyed and the State and the Church must fall with it." But how is the family to be preserved if the *religious sustenance* be disdained and the merely *pactional* is to take its place. In this connection, I would quote the historian Lecky, from his *grand* work on European morals: "Against these notions (of transient connection and easy divorce), Christianity declared a direct and implacable warfare \* \* It taught as a religious dogma, invariable, inflexible and independent of all utilitarian calculations, that all forms of intercourse of the sexes, other than life-long unions, were criminal. \* \* \* There is probably no other branch of ethics which has been so largely determined by special dogmatic theology, and there is none which would be so deeply affected by its decay."

Thank God, the people of Canada know how to estimate and do value and cherish the sacred character of the matrimonial tie, the purity and sacredness of the family—they know these sentiments—attributes of the higher law—are the source and life of Christian civilization and that without them no nation can permanently prosper. One of the ablest and purest writers and thinkers of the day, Goldwin Smith, has well said—"The family is of more importance, than the State; the family may regenerate the State but the "State cannot regenerate the family."

We may well be thankful that *we* can show a cleaner record than that of any other progressive people on the face of the earth. Till within a few years the ratio of divorce to population did not exceed one to a million of *our* people (the highest in any year was under three to a million) (*v*) but who can deny that a germ of evil has reached us, who can deny that there is evidence of a growing tendency towards loose views—a *tolerance* of sentiments that a few

(*v*) For later statistics see *Ante*  
p. 257.

years ago would have been promptly scouted and condemned. Nor is it to be wondered at with the contagion of evil example at our doors, a sort of legalized licentiousness under the specious veil of divorce, obtainable in some States on the most frivolous grounds—decrees almost mechanically granted with indecent haste—a frightful evil all the more fatal to morals and the more dangerous to us because flourishing under the shadow of law and amongst the citizens of a great and mighty nation—people of our own race, speaking our mother tongue, with whom we are in general and constant communication—social, literary and commercial, their country bordering us for some 3,000 miles. Yes the best men in the United States have looked upon their divorce system as a malignant epidemic of evil. Some thirty years ago the evil was confined to a few States but the diffusive powers of poisonous principles prevailed, and now it has overspread the country from the Atlantic to the Pacific. In the early days the people saw the danger at a distance, and abhorred the evil thing. Perhaps they thought with Pope—

“Vice is a monster of such hideous mien  
That to be hated needs but to be seen ;”

and disregarded the moral :

“Yet seen to too oft familiar grows her face—  
We first endure then pity, then embrace :”

and the insidious influence worked on—its malign effect is now palpable to all. Dare *we* say proximity to evil example can work no corruption of sentiment amongst us ? Are we in any respect better than the men who assisted to extend the mighty nation to the south—the men of the strong will and toiling hand, who in the field, the forest, the mine and on the lake and the river, worked and worked successfully, in extending the settlements, and doing all that intelligence and labor could accomplish ? No, we can claim nothing of the kind—as they were, so are we. Human nature is the same, and the influences they succumbed to must sooner or later operate with us if we do not (warned by their past) take precautions in time. Let us not slumber under the conscious feeling that no general loosening of moral restraints is to be found in this community. Eternal watchfulness is one of the safeguards of National purity as well as liberty. Let us take precautions in time. We have ample provision to guard against the introduction of contagious diseases and for treatment should they appear. Surely something may be done towards public safety in respect to a virus worse than leprosy itself regarding its effects on the social condition. It is the province of law in the National life to protect and conserve, and the conservation of morals is a worthy and a noble aim.

The subject of divorce has not been unnoticed in the public press, but it has not been pressed upon the public attention by

those who might be expected to notice the moral and religious bearing of the question. And yet we Canadians value religion and its teachings ! We have Churches, church buildings and "meeting houses" thickly dotted over the country. Nearly every religious body has an organ of its own—our ministers we count by the thousand. One is almost tempted to ask—are the watchmen all ignorant, or are they blind or sleeping, that loud warning voices have not rung again throughout this Christian land. Even the notorious Col. Ingersoll had a word to say against lax views touching marriage and the family ; declining in this particular the teachings of his infidel school. His words are emphatic. He says : "Civilization rests upon the family. The good family is "the unit of good government. The virtues grow \* \* where "one man loves one woman. Lover, husband, wife, mother, "father, child, home—without these sacred words the world is "but a lair, and men and women merely beasts."

I find this mentioned in an admirable latter work "Mistakes of Modern Infidels" by the Rev. Mr. Northgraves, a Canadian priest, who remarks "this is almost the only truth to be found in the book named, 'Mistakes of Moses' and adds :—Take away God's revelation and how will you show that man may not have as many wives as the Grand Turk \* \* You are inconsistent in using such arguments while rejecting Christianity. You cannot produce from all the repertoires of infidels a solid argument against polygamy."

This may be said for Ingersoll that he does not at all events glory in the sentimental impurities of Eugene Sue who speaks of marriage as a galling device—a pledge that cannot be taken without falsehood or folly. "We ought not" Sue says "to accept "such bonds for were our love to cease we would wear chains "that would then be a horrible tyranny."

I have dwelt perhaps too long on this aspect of the subject and should have reserved my small measure of strength to speak of the practical side ; but I felt it a plain duty to bring out facts and to direct attention to great dangers which I believe threaten us, but may be averted by the zealous use of proper means.

The Constitution has conferred upon Parliament the power of granting divorce. Whether it would have been better to enact a general law on the subject and leave a court or courts to apply legal rules in particular cases I do not now pause to discuss. *There* is the power and what has been done to regulate its exercise ? Whatever differences of opinion there may exist on the subject of divorce, all will agree with me that the law which permits separation between man and wife—the dissolution of a sacred life tie—should be administered by a known and safe method, the causes of dissolution supported by reliable evidence, severely, calmly and discreetly tested, and the enquiry conducted with some regard to legal forms.

Those who feel constrained to vote against divorce in every case will I hope see with me, that any scheme for better regulating and guarding the exercise of the legislative power of divorce against hasty or imperfectly considered action and calculated to to what is orderly and safe in administration, will be a *positive* good, and I look with confidence for their favorable consideration of the scheme, and trust that they will accord at least as much sympathy and aid as those who hold the same views in the United States *have accorded* to the efforts for divorce reform in that country.

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THE FOLLOWING EXTRACTS ARE FROM "A TREATISE ON FACTS AS SUBJECTS OF ENQUIRY BY A JURY" BY JAMES RAM, LONDON, 1861.

ON NARRATIVE OF FACTS (*w*).

On every judicial inquiry, civil or criminal, before a magistrate, court, or other tribunal of justice, there is a story, the subject of the inquiry, a story of facts. In the case of a trial, usually each side has its own story, the two tales united forming the subject of the trial. It seldom happens, that the whole subject, or even the whole story of either side, is told by one witness; but it commonly consists of different parts, distributed among several witnesses, each of whom tells the share, which he is acquainted with.

A witness about to narrate facts may be left to tell his story in his own way; or it may be drawn from him by questions put to him. The former method of telling the story is open to these objections:—The witness may not think enough to call to mind all he can relate; from carelessness or oversight he may omit to mention some circumstances: he may think or fancy the circumstances he withholds are not material to a proper understanding of his story; indeed, he may think or fancy that his story will be best understood, if it be not loaded with matters, which he views as redundant, but which nevertheless are essential to see the facts in their proper proportions and colour. Another danger is, that the witness will not confine himself to things, which he himself saw, heard or did, but will diverge into hearsay, or common report, into things, that is, which he has heard some one else say were seen, heard or done. Supposing, besides, the witness does not wish to speak the whole truth, it is obvious his wish will be promoted, by leaving him to tell his tale in his own way. \* \* \*

In the other method of obtaining a relation of facts, the one

by question and answer, the object of the interrogator is to get from the witness all he himself saw, heard, said and did, excluding all hearsay and other irrelevant matter. And the questions being framed with a view to this exclusion, if the witness confines himself strictly to the questions addressed to him, his answers will contain no hearsay or other irrelevant matter. But as according to this method, the witness's narrative consists solely of his answers to the questions put to him, this obvious inconvenience attends it, that if all the questions required to bring out the witness's whole story are not put to him, he may in his evidence leave out circumstances important to be known. \* \* \* \*

The basis of interrogation of a witness is something, which his examiner desires to be informed of, and which he knows, thinks, assumes, or hopes the witness will be able to tell him.

There are two ways of questioning: one where the words made use of in the question suggest or prompt a particular answer, and which is called a *leading* question: the other where the question does not so lead, but is put in general terms, without at all pointing to a particular reply. This may be called an *open* question; it is open to any answer. "Did not you see this?" or "Did not you hear that?" are leading questions (x). In them the person questioned is in a manner prompted to answer, he did see or hear this or that particular thing. "It is a good point of cunning for a man to shape the answer he would have in his own words and propositions; for it makes the other party stick the less" (y). \* \* \* \*

Assuming that the person questioned honestly desires to speak the truth, and that his memory is not defective, a strong probability is that whether the question be open, or leading, he will return precisely the same answer to it. Each kind of question has, however, its advantages and disadvantages. If the witness be dishonest, and there be connivance between him and his interrogator; or supposing the former honest and the latter not to be so; it is plain that a leading question may tend to bring out the answer, which the interrogator desires. And assuming that both the witness and the interrogator are honest, both wishing the truth to be spoken; here, if the witness remembers little or nothing, or if he be dull, or heedless, or be confused or embarrassed by timidity or any other cause, there is danger that, if he is addressed by a leading question, he may, without thought or consideration, echo in his reply the words put in the question, and so fail to speak the truth.

An open question imposes on an honest witness the necessity of thought, a consideration of both the question and reply. It forces him to resort to, and if need be, to ransack his memory, and

(x) 3 Bl. Cm., 449, 15th, Ed.

(y) Bacon's Essays: of Cunning.

obliges him to utter only what he remembers. On the other hand, it is very possible, in many cases probable, that from sickness, old age, or other cause, his memory may be so infirm, that he cannot be brought to a correct answer, except by a leading question. All open questions, every question short of a leading one, may fail to quicken his memory, and bring him to express the fact of which he has knowledge.

“Leading questions, that is, such as instruct a witness how to answer on material points, are not allowed on the examination in chief. . . . Questions which are intended merely as introductory, and which, whether answered in the affirmative or negative, would not be conclusive on any of the points in the cause, are not liable to the objection of leading.” . . . “Leading questions are admitted in the cross-examination of a witness.” (z)  
\* \* \* \*

Whenever a person makes a relation of facts, be it on a judicial inquiry or not, and whether he tells his story spontaneously, and without being questioned, or on request and through questions put to him, it is certain the tale is often imperfectly, or falsely, told; and when this is known or suspected to be the case, and it is desired to have the exact truth, to ascertain what part of the story is true, what false, and what is left out, these matters may be learned by searching for them through questions put to the relater; an inquiry, that is called cross-examination.

On a trial, the cross-examination of witnesses is often of the utmost importance and service towards discovering the truth, and the extent to which the witnesses are to be believed.

In many cases each party is honest and desires justice alone; but where there is not this upright spirit, either or each of the parties, looking at the consequence the verdict will have, may endeavor to set the facts of the case in a light most favorable to himself, and therefore to mould, disguise, or suppress some of the circumstances. When such is the state of mind of each or either of the parties to a suit it may be imagined it will sometimes infect the integrity of the witnesses. From this source may arise the unwilling, the prejudiced, the partisan, the false, witness. In cases of this description the service which a cross-examination may be of is manifest. But the benefit of cross-examination is not confined to cases of this disreputable kind. For on every trial, after a witness's examination by his own side, or examination in chief, as it is called, is closed, these considerations may arise in the mind of the opposite party:—the witness may have spoken the truth, but not the whole truth; or he may have spoken the truth and something besides the truth; or some of the truth may not have been brought out, because questions suited to elicit it were

(z) Phillips on Evidence, Vol. 1, p.  
p. 255, 261, 6th Ed.

not put to him—the witness may be mistaken in a matter which he has stated as a fact ; he may have misapprehended it ; he may not have seen what he thinks he saw, or heard what he thinks he heard : he may have spoken to a fact with greater confidence than is justified by his imperfect knowledge of it : his present story may not be consistent with his relation of it on some former occasion : the witness's character may be required to be searched into, to judge how far his evidence is to be believed. \* \* \*

Many are the just objects of a cross-examination according to the circumstances of the case in which it is used ; its only design being to elicit truth. But the legitimate end of a cross-examination is sometimes perverted to serve a bad purpose,—to alarm, mislead, or bewilder an honest witness, when the effect may be to hide rather than to bring out truth.

It is plain that for the purpose of : n effective cross-examination, the cross-examining party must be in possession of some information, suspicion, or other matter on which to found it. This he will use as a clue to the further evidence desired. Without this guide the cross-examiner will wander in the dark, and, except by mere accident, will not arrive at any evidence of the smallest importance. The information, suspicion, or other matter forming the ground of a cross-examination, may be possessed quite independently of the examination in chief ; or it may be gained in the course of the examination in chief or cross-examination. And consequently it is not necessary, that a clue, or all the clues, by which to cross-examine, should be in hand at the commencement of the examination in chief or cross-examination ; they may be picked up in the midst of either.

In a cross-examination, the party examining makes use of the witness as, for this purpose, his own witness, as a witness on his own side. And he has a hope and desire, that the evidence in the cross-examination will so contradict, vary, explain, or otherwise affect, the evidence in chief, that the result of the whole, or at least part, of the evidence on the two examinations combined will be favourable to his own side.

A cross-examination intended to destroy, or at least, weaken the evidence given on the examination in chief, very often ends in confirming or strengthening it. The knowledge of this frequent result of cross-examination was probably the ground of Lord Eldon's observation on interrogating a prosecutor. "He was wont to say, jocularly, that he had been a most effective advocate for prisoners ; for that he had seldom put a question to a prosecutor." (a). \* \* \* \*

A cross-examination of a witness often gives rise to a re-examination of him by the side, which examined him in chief. One

(a) Life of Lord Eldon, by Twiss,  
Vol. I, p. 106.



object and effect of the re-examination may be, to repair the damage, which the cross-examination has done to the evidence given in chief. This reparation will take place, partially or wholly, if the effect of the re-examination is, to damage in turn the evidence given in the cross-examination, by partially or wholly destroying the force of it, whether through additional facts elicited, or by altering or effacing the evidence given in the cross-examination. An effect of a re-examination may be, to confirm the evidence given in the examination in chief. Or, on the other hand, an effect of it may be, to confirm the evidence given in the cross-examination.

When a cross-examination has brought out some fact, not contained in the evidence in chief, a re-examination on that fact is, in reality, a cross-examination; and a further examination following *this* cross examination will be a re-examination, and this may confirm the original or first cross-examination. \* \* \* \*  
\* \* In relating a story, adherence to the order of time, in which the circumstances took place, is usual and certainly desirable, since a subsequent introduction of an incident, that in the order of time, should have been noticed before, disarranges the plan of the story already in the minds of the hearers. So, in putting questions to witnesses, a strict observance of the course of time is of use, as it relieves the jury or other persons called upon to consider the evidence, from the trouble, they might otherwise have, of arranging anew the facts already in their minds.

Of equal use it may be, to call witnesses successively for examination, according to the order of time, of which they are to speak. But this order is not always attended to. The catastrophe of events is sometimes exhibited before the plans, which were laid to effect it. \* \* \* \*

Such a departure from the regular course of time may sometimes be produced by a desire to study and promote the convenience of witnesses in their attendance. But as this inversion of time is not usual, on ordinary occasions, in telling a story, the jury or other persons before whom the facts are detailed, probably expect to hear from the witnesses the tale related in the common way; a way which necessarily saves them the trouble, after hearing the whole evidence, of sorting the details, and fixing them, as to time, in their proper places.

It is true that on a trial the examination of witnesses is commonly preceded by a statement by counsel of the facts he proposes to prove by the witnesses, and that in this statement these facts are usually mentioned according to the order of time in which they happened; yet this course evidently tends to lead the jury to expect to hear the facts related by the witnesses in the same order of time they have heard them in the statement; and when this method is not pursued, the departure from it is likely

to confuse the facts in their minds, and occasion them embarrassment. It must, besides, not be forgotten, that the story upon which the jury are to give their verdict, is not that contained in the statement of counsel (which may or may not be proved), but that which is detailed by the witnesses.

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#### OF A WITNESS'S DEMEANOR UNDER EXAMINATION (b).

The carriage and behaviour, in a word the demeanor, of a witness, signified by his words, looks or gestures, while under examination, will deserve consideration, in determining the credit, which ought to be given to his testimony. Demeanor may be a warrant of integrity in the witness, or betray a want of it. It is often one can say of a witness, his manner is open and ingenuous ; it is the manner of an honest witness. So a witness may be very honest, although his demeanor is, in some respects, open to censure, and deserves rebuke. Constitution of mind, habit, manner of life, may give him a coarse, blunt tongue, and a manner in appearance, yet not meant to be uncivil or disrespectful. Such a rough, unrefined, nature or carriage may well consist with a habit of speaking the truth, with an abhorrence of falsehood, and a wish and determination to give true evidence. A test and proof of his honesty may be, that neither in taking the oath nor giving his evidence, does his manner imply any irreverence for the oath, and its sacred duties.

Demeanor consisting in confusion, embarrassment, hesitation in replying to questions, and even vacillating or contradictory answers, are not necessarily a proof of dishonesty in a witness, because this deportment may arise from bashfulness, or timidity, and may be the natural and inevitable effect of an examination by a skilful, practised, perhaps unscrupulous, advocate, whose aim in his questions is, to entangle, entrap and stupify the witness, and cause him to say and unsay anything or everything. It may not be good behaviour in a witness, to suffer his eyes to wander about the court while he is under examination, but this conduct may not be unnatural in the midst perhaps of an entirely new scene to him ; and the distraction of mind occasioned by that employment of his eyes may well cause him, on returning to his duty, to answer hastily, and without consideration. But in all this there may be no intentional disrespect to the court ; and the witness notwithstanding may be a very honest one. Again, it happens to all persons occasionally, without thought to use one word for another, making the sense very different from what was intended ;

unconsciously we say what we did not mean to say. In like manner, a witness may inadvertently contradict himself. Demeanor, nevertheless, if it affords any fair ground to suspect the witness does not speak the truth, imposes the necessity of caution in putting faith in his evidence.

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OF DIFFERENT EVIDENCE OF TWO WITNESSES (c).

A question of credit often arises on different, or contradictory, evidence given by two witnesses.

When two persons have been present when a fact took place, when something was heard or seen and each gives an account of the fact, their stories sometimes quite, or at least very nearly, agree. But at other times it is found, that the account, which one gives of the fact, or if not of the fact itself, the main fact, yet of some accompanying circumstance, differs much from the account given by the other. A discrepancy of this kind necessarily raises a question of credit; and this, whether the witnesses are honest or dishonest.

Assuming that each of the two is an honest witness, the disagreement in their accounts is to be sought for in each one's perception of the thing seen or heard, the impression it made on him and his remembrance of it. From inattention, interruption, a less acute sense of hearing or sight, distance from the sound or object heard or seen, or from some other cause, one may not have had the same perception or impression, which the other had of the particular thing; or the memory of the one may be better than that of the other.

Very often the fact is the utterance of certain words; and the persons who differ may be two, of whom the speaker himself is not one; or two persons, of whom the speaker himself is one. If the words are those spoken by one in the presence of two other persons, one of these two may not have caught all the words spoken; or, from the similarity in sound of words having different meanings, or from some other cause, he may have misapprehended them; and supposing he heard the words, he may not remember all of them, or may retain but a faded impression of some of them. It very often happens, that two persons being present at a conversation between others, one may hear one part, and the other another, or one may recollect what he has heard, and the other may not. \* \* \* \*

Setting aside all personal interest in the matter, and supposing an instance, in which it may be perfectly indifferent to a person,

whether he uttered certain words or not, there seems to be no reason why, generally speaking, a denial by a person that he used certain words should carry with it greater weight, and be more credited, than the affirmation by another person that he heard the words used. \* \* \* \*

It is very clear that two persons may be present when a thing is said or done by a third, and one of the two may hear or see it, and the other not. And therefore if A says that a certain conversation took place between B and C in a room where D was present; and D says that no such conversation took place; A and D are in conflict, and necessarily so, if it was impossible for the conversation to take place without D's hearing it. But if D says he did not hear the conversation, or, meaning the same thing, that it did not take place, A and D are not necessarily in conflict, if it was possible the conversation might have passed without D's hearing it.

It is not a very material matter, when two persons are giving an account of the same discourse or transaction, that there should be some variation, and a want of exact similitude between the accounts they both give (*d*).

On the trial of Hardy for high treason in 1794, Groves and Green, both witnesses for the Crown, directly contradicted each other; their different accounts relating to words, which Groves positively said he heard Green use, and which Green as positively said he did not use. From the materials contained in the trial, it might be very difficult to collect, which of the two witnesses spoke the truth; but their conflicting evidence is now of value, for the sake of the judge's observations on credit in a case of contradictory evidence. Lord Chief Justice Eyre, in summing up to the jury, told them,—“Here, undoubtedly there is a flat contradiction between Green and Groves; they are both witnesses called on the part of the Crown; they certainly put you under a dilemma, and make it difficult for you to be satisfied that Groves is a person who is entitled to credit for what he has said. At the same time, though Groves is contradicted in this particular by this witness, he is contradicted in no other particular, where witnesses might have been called to contradict him. That is a circumstance for your consideration, upon which you will exercise your judgment. I am not at all pressing you to incline to give more credit to a witness, who has been contradicted in one particular than, the whole tenor of his evidence, upon the whole, entitles him to (*e*).”  
\* \* \* \*

On the credit to be given to a witness, Lord Chief Justice Tindal told the jury:—“P. is the spot at which the alleged conversation took place; and if he was not there at the time he

(*d*) Chief Justice Tindal in Frost's Trial, pp. 698-699.

(*e*) Hardy's Trial, Vol. II, p. 391.

states he heard the conversation, that would at once make him a witness in whom you could place no confidence whatever. Therefore the inquiry, to which you are in the first instance to bring your minds as to this witness, is, to determine upon the value of the witness's testimony, before you give it any credit at all." And in noticing Jones's evidence he said: "You cannot set down one witness by contradicting his evidence by another, unless you are first satisfied that the second witness is superior in value to the first." And on Watt's evidence his Lordship remarked: "If this man is correct in the judgment he is giving of the time and the distance at which he met Hodge, then the evidence of Jones cannot be true." And on the evidence of both Jones and Watts he told the jury:—"It is for you to decide, which of them is speaking the truth; you must make up your minds, from the manner in which they gave their evidence, the demeanor of the witnesses, and still more from the probability of the account and circumstances, which they relate before you." (f) \* \* \* \*

Time and place are concomitant circumstances of every fact; and probably most facts have other attending circumstances, which attract, or might attract attention. Supposing two persons heard the same words, or saw the same deed, and each to have in his memory an equal impression of the fact, the words or the deed, then each will be able to give the same account of the fact, and he does so if he narrates faithfully from his memory. But of the time, place, or other attending circumstances, the account of the one may differ from that of the other. A cause of the difference may be, that one of the two noticed more of these circumstances than the other did; or that one of them has forgotten some of the circumstances. \* \* \* \*

"I know not," says Paley, "a more rash or unphilosophical conduct of the understanding, than to reject the substance of a story, by reason of some diversity in the circumstances, with which it is related. The usual character of human testimony is, substantial truth under circumstantial variety. This is what the daily experience of courts of justice teaches. When accounts of a transaction come from the mouths of different witnesses, it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These inconsistencies are studiously displayed by an adverse pleader, but oftentimes with little impression upon the minds of the judges. On the contrary, a close and minute agreement induces the suspicion of confederacy and fraud (g) \* \* \* \*

(f) Frost's Trial p. 297.

(g) Paley's Evidences of Christianity, Part III, C. I.

## OF A WITNESS UNDER EXAMINATION.

The duty of every witness, sworn to speak "the truth, the whole truth, and nothing but the truth," is to observe strictly the oath he has taken. In the performance of this duty, the witness (an honest one is meant, that is, one desiring to keep his oath) often meets with many difficulties; some emanating from himself, and others from the manner of his examination.

Whether rightly or not, the witness may think his task full of embarrassment and difficulty, because his examination is in public, before a tribunal presenting a grave and solemn appearance; before a large assembly of people, hearers and spectators, a scene perhaps wholly new to him. To him it may be a trouble publicly to tell his story at all; but to make the matter worse, this story he is generally not allowed to tell in his own way, in the manner he would tell it privately among his friends. He usually finds he has to relate it only in his answers to questions put to him. This restriction laid on him at the outset, to relate his story by answers only, his discovery that he is not permitted to tell it in the manner he naturally otherwise would, wholly spoils the arrangement he has made in his own mind of the matters he has to tell, occasions a confusion of them, and thence causes him embarrassment. He is unaccustomed to this mode of telling a story; and it can therefore be readily understood, that often his answers will stray from the strict limits of the questions put to him.

To relate facts correctly requires in all cases some thought, and the time necessary for it. And if the facts are not at once remembered in the order in which they happened, time may be required to sort and range them in their proper order. And suppose, in the case of a witness, they are already so arranged in his mind, it may be difficult for him, instantly on being questioned, to produce the particular fact; which the question calls for. At any rate the ability to do this requires composure of mind, and a power of abstraction from irrelevant thoughts; and anything disturbing that composure or power is a hindrance to the witness.

Hence where the question is perfectly well understood by him, and he has no objection to answer it in a plain direct manner, yet he often goes about to answer it. He naturally does what he would do on being asked a question in conversation, or otherwise upon ordinary occasions. His mind retreats within itself to find the answer. This must relate to something that has happened, and a consequence is, he searches his memory, and in doing so falls in perhaps with something, which leads him astray from the point of the question; he is involved in a train of ideas, connected indeed with the question, and leading to the answer, but he has to make his way through those ideas to get at it. \* \* \* \* \*

One very common way in which a witness supplies an answer is, to suppose or assume something, and to reason and conclude upon it, what is called a "reasoning answer." This kind of reply is always objectionable, on the plain ground that the supposition or assumption may not authorize the conclusion drawn from it. A witness instead of saying that a particular thing was so, will say, it must have been so. On these occasions, the witness is properly admonished in this manner,—Do not tell us what must be, tell us what was. A witness (a woman) is asked, "Have you never declared to anybody that you had an expectation of some provision from the cause now in hand?" The witness answers, "I could not declare it, as I had no offer made me from the prosecutor." Here the witness reasons on there being no offer made, and from the want of it would have the inference drawn, she did not make the declaration; although it is manifest she might have done this; notwithstanding the offer was not made.

It is obviously advantageous to the side examining its own witness, that the witness be in a composed state of mind, and free from any cause to ruffle his temper. The advocate therefore examining him will probably think it to be his first care, to remove any timidity in the witness, to soothe all nervous excitement in him, to set him as far as possible at his ease. This may often be affected by, as an introduction to his evidence, asking him questions of his name, age, place of abode, and the like simple inquiries easily answered. Self-possession being infused into him at the outset, it will then be a chief object to sustain it, by throughout the examination addressing the witness in a gentle, conciliatory tone and manner. It will plainly much assist to preserve the witness's composure and self-possession, to interrogate him in words unambiguous and easily understood; and if the witness be of humble life, to make use of common and homely words likely to be most familiar to him; and, as occasion is found, to borrow and take advantage of provincial words and phrases, used in the place or district where the witness lives. And on this head it may be useful to bear in mind, that persons in a low station of life understand and use many words in a sense different from the common meaning of them among educated people. The witness may not understand the expressions of the advocate, and, on the other hand, the advocate may not understand those of the witness.\* \* \* \* \*

Dociility and friendliness of a witness are of the utmost consequence. And courtesy towards him is a probable means to obtain and keep them; courtesy in words, voice and manner. Rudeness or incivility towards him is very likely to put him out of temper, to make him lay back his ears. Little peculiarities of his nature must be humoured; his sense of personal dignity must not be offended; if he be deaf, or have an impediment in his speech, this

infirmity must not be a subject of merriment ; and if his voice be naturally or from timidity low, he should be gently, not roughly, exhorted to speak up. So, if the witness exhibit any clownish or awkward habit or manner, it may be better to let it pass unnoticed than to attempt to correct it.

It is a common practice to tell a witness, over and over again to mind he is upon his oath. Few witnesses bear this repeated admonition patiently. But when used in moderation, and free from an angry tone, the witness has no reason to complain of it, for it is known that some persons will *say* what they will not *swear*. \* \* \* \* \*

If a question may give pain to a witness, as it may do if it touch some chord of sorrow occasioned by death, that of a child or parent ; or if it touch on some failing or misconduct of the witness himself, or of his relative or friend ; the question should be waived, if possible—but if inevitable, any seeming unfeelingness in it will be avoided, and the sharpness of it much abated, by introductory expressions, deploring the necessity of asking it, and representing it as an unwelcome and imperative exercise of duty.

It is the cross-examination, however, which gives a witness (an honest one is still meant) the most trouble—here he falls into the hands of an enemy.

The witness, when he goes to be examined, takes it for granted he is about to relate certain of the facts, from which the pending issue proceeds, and these facts only ; and it never enters into his head, that questions will be put to him about events and matters, which form no part of his story, and which perhaps happened years ago, and long before the present subject of inquiry had any existence. Such questions are, however, every day put, and of course they take the witness by surprise ; and he is often not prepared on a sudden to recollect the matters so inquired into, and consequently any difficulty he felt before in giving his evidence may by this means be tenfold augmented. \* \* \* \* \*

It is to be feared that an object of cross-examination too often is, to raise a laugh, or to betray ignorant witnesses into confusion and trifling mistakes. It frequently happens, that innocently enough, and through sheer bewilderment, the witness utters mistakes and contradictions, dangerous, if not fatal, to his credit, and as consequence, putting justice in peril. \* \* \* \* \*

The temper of a witness is often tried, and his feelings hurt, by his cross-examination on his past conduct. He may have been charged with this or that offence ; he may have been in prison. Questions on these matters are often properly put, with a view to see how far the witness is now entitled to credit ; yet if the conduct inquired into is that of some years ago, and thus unlikely to injure his credit now, it may be great and needless cruelty to bring again to light such bygone stains on his character.



Except in the case of a dishonest witness, one prepared to trifle with his oath, a witness may justly put in, and stand on, a right to receive courteous, or at least inoffensive, treatment at the hands of his examiner. In his character of witness he is a servant to justice ; by the sacredness of an oath he binds himself to speak the truth ; and while he fulfils the duty so imposed upon him, he is entitled to the respect, which, by the usage of society, the observance of any duty commands and receives. \* \* \*

From an unwilling, dishonest witness, one that is prepared to trifle with his oath, it is, as it may be expected, often difficult very difficult, to get the answer desired, and which it is in his power to give. He is aware of the object of the examination, he knows the exact answer that is fished for, and he exerts all his skill and cunning not to come within the net spread out for him. He is obliged to come very near, all but in it. But so long as he can pertinaciously clear of it. To a series of questions, sorely pressing him, and increasing in power as they proceed, he answers evasively, sometimes as if he did not understand the question, or as if the question were quite different from what it is. So long as he is able, he imitates the poor maniac Madge Wild-fire, by laughing in his sleeve and saying to himself :—" catch me if you can." \* \* \*

An unwilling witness will sometimes make up his mind, that, if possible, he will not give the answer required, unless a question pointed direct to the answer is put to him. \* \* \*

To overcome an unwilling, dishonest, witness may require that the interrogator have more than ordinary sagacity, have great experience in the examination of witnesses, and be possessed, besides, of ever-enduring patience, and a temper proof against discomposure. The obstinacy of such a witness may sometimes be surmounted by putting him off his guard, through the introduction of some subject, which will amuse his mind, and for the moment withdraw his attention from the point of his examination, and make him forget his purpose of resistance.

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#### OF CONCLUSION FROM FACTS.

The purpose of an inquiry into facts before a jury is, to draw a conclusion from them,—an answer to the particular question they raise.

In the majority of cases the evidence of witnesses consists of ordinary matters of fact, common things which persons have said or done, which the witnesses have heard or seen, and which a jury have little or no trouble in making themselves masters of. \* \*

In preparing for their verdict on the facts detailed in evi-

dence, a main object of a jury will be, to set these facts in such an order and light, as will give them the best view of them, and so facilitate their decision upon them. As everything depends upon their belief of the witnesses, they will probably begin by considering the credit due to them, giving to everyone the credit which they think he is entitled to, and refusing to give any credit to others, whom they find to be unworthy of belief. Another step will be, to weigh directly contradictory testimonies, keeping the one which they think preponderates, and discarding the other. Opposing testimonies, which admit of reconciliation, they will reconcile accordingly. By a sifting process they will dismiss from their minds all the immaterial facts. In the case of two or more defendants affected by different evidence, the jury will make the necessary separation and adjustment of the evidence. By these and the like means, according to the circumstances of each case, the jury will have drawn into comparatively small compass all the facts, they need now at all look at. In this state of things the witnesses' parts are over; they have left the scene; and the facts, which the jury have now to attend to, stand by their own strength; such as they are, there they are; and the jury have not now to consider how they came by them.

These facts ranged in their proper places, as time and other incidents require, form a story. Often there is *direct* evidence of every part of the story; to complete the tale there is not wanting *direct* evidence of any fact.

In other cases the facts proved by *direct* evidence form an incomplete story; the chain of facts composing it is imperfect; to complete the chain there is wanting evidence of some link in it. In a case of this sort, the missing fact can sometimes be supplied by the facts proved by the *direct* evidence: from these facts the one missing can be *inferred*. The circumstances proved by the *direct* evidence supply the *inference*; they are thus themselves evidence, although not direct, of the fact wanting; and they united with the inference, constitute what is, and is called, *circumstantial evidence*. To draw the inference is the province of the jury.

When from acts proved by *direct* evidence against a prisoner a jury *infer* his intention in doing them, the direct evidence, together with the inference, form *circumstantial evidence* against him.

Intention, in the sense of design, purpose, with which an act is done, is a common subject of inquiry by a jury. Intention is a mental fact: it exists in the mind of the man who conceives it. It is in his power to conceal it from all other men. If he does nothing by word nor act to disclose it, no one else can penetrate to it, no other person need imagine its existence. But the man himself, in whose mind it exists, can and often does disclose it to others purposely and expressly by his words, oral and in writing. And besides, through some act of his,

undesignedly on his part, his intention may be revealed. If from his intention as their source he does certain acts, from them other persons may, contrary to the man's will and expectation, infer the intention from which his acts proceeded. \* \* \*

It is clear that often "imputation and strong circumstances lead directly to the door of truth;" and circumstantial evidence is by many thought more satisfactory and conclusive than evidence which is wholly direct. This is nowhere, perhaps, better expressed than in the following words of the Chief Justice on the trial in Dublin in 1823, of Forbes and others, for a conspiracy and riot. "I am warranted in saying that circumstantial evidence is frequently considered more unerring and satisfactory than direct proof, which may be the result of misrepresentation and perjury. If a man be murdered, but no one sees by whom, or how, there can be no direct evidence of that fact; but if another person who has been known to have borne an ancient grudge against the deceased, and has been heard to make sanguinary and vindictive declarations against him, be found near the bleeding corpse with a deadly instrument covered with blood; this, though not direct evidence of his guilt, would yet, if unexplained, form a mass of circumstantial evidence, which it would be next to impossible for the human mind to resist. \* \* \*

The result of circumstantial evidence can be but probability, not certainty; as probability of guilt, not certainty of it. And probability of guilt arising from circumstantial evidence may ultimately, and too late to save innocence, be discovered to have been ill-founded. \* \* \*

But even where *all* the evidence on a trial is *direct*, it may happen that the conclusion, which the jury come to upon it, is not grounded on truth; for not only may honest witnesses be themselves deceived, and give positive testimony of that, which is not true; but dishonest witnesses may perjure themselves in their direct testimony. \* \* \*

When on a trial, evidence is given by two witnesses, each of whom directly and entirely contradicts the other, the verdict sometimes depends wholly on the preponderance, which, on a balance of their credit, the jury find to be in the credit of one of them; not credit founded on their characters alone, but on all the circumstances in evidence. In these cases the only question for the jury is, whether they believe A or B; a question that often causes them much perplexity. The consideration of preponderance may arise, where neither of the two witnesses is a party, nor the wife of a party to the cause: or where one of the witnesses is a party, or the wife of a party, to the cause; and the other a witness for the opposite party: or where the two witnesses are themselves the opposed parties in the cause: or where one of the witnesses is the wife of one party, and the other is the wife of the other party.

In a case of contradiction of this nature, if the jury on the evidence believe one, or both, of the witnesses to be dishonest, this belief alone may not remove their difficulty ; it may still leave them much trouble to decide, to whose testimony they should give the greater weight. For supposing one only of the witnesses to be believed to be dishonest, his dishonesty may not so far infect and damage his whole evidence, as to make it vail before the weak evidence of the other, although honest, witness. And if both the witnesses are believed to be dishonest, this equality of character being settled, there will still remain the question, of the two, whose evidence is more to be trusted.

If the jury believe both the witnesses to be honest, and equally so, this necessarily contracts their inquiry, and saves them much trouble, for dishonesty is then out of the question. And in any case, whether the witness be honest or dishonest, so soon as the question of credit founded on character is settled, the jury for the purpose of determining whether, of the two witnesses, they believe A or B, will have to turn to other considerations authorized by the evidence ; as for instance, according to probability on the circumstances, whether this or that witness's original perception of things, he says he saw or heard, was perfect or defective ; whether the impression they made on him was strong or weak ; whether his remembrance of them is to be depended upon. \* \*

From the opening of a criminal trial to the close of the evidence, the witnesses gradually unrol the circumstances before the jury ; some pointing to guilt, others, it may be to innocence ; and some, perhaps, are neutral, inclining to neither. Of the two former kinds, pieces of evidence, one after the other, are placed in the scale of guilt, or in that of innocence. And if at the end, the jury having, individually and collectively, weighed the evidence with care, they come to the determination, that the scales of guilt and innocence stand even, neither of them inclining to the one side, or the other, the effect will be, the jury will doubt, and giving the prisoner the benefit of this doubt, they will say, not guilty.

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